From:	(b) (6)
To:	Kaplan, Marvin E.
Cc:	Shinners, Gary W.
Subject:	AFL-CIO Request for Extension re: RIN 3142-AA12
Date:	Monday, February 26, 2018 10:12:48 AM
Attachments:	Letter to Chairman Kaplan-R case procedures-Extension request.pdf NLRB FOIA Request 12-22-17 - final.pdf

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Please see the attached letter and enclosure from Craig Becker.

Thank you,

--

(b) (6)
AFL-CIO Office of the General Counsel

815 Sixteenth Street, NW
Washington, DC 20006
(b) (6)
(202) 637-5323 (fax)

American Federation of Labor and Congress of Industrial Organizations
815 16th St., NW
Washington, DC 20006
202-637-5000
aflcio.org

AFL-CIO
AMERICA'S UNIONS

December 22, 2017

Freedom of Information Office
National Labor Relations Board
1015 Half Street, S.E.
4th Floor
Washington, D.C. 20570

Dear FOIA Officer:

In relation to the recently issued Request for Information concerning the National Labor Relations Board's representation election regulations, 82 Fed. Reg. 58783 (Dec. 14, 2017), we hereby request copies of the following documents. We ask that such documents be made available no later than January 26, 2018, so that we will have an opportunity to analyze them in time to provide the Board with meaningful information by February 12, 2018 deadline.

Definitions and Instructions

For purposes of this request, the term "Final Rule" means the final rule published by the Board on December 15, 2014, *see* 79 Fed. Reg. 74307 (Dec. 15, 2014).

For purposes of this request, the term "compilations" means data or information obtained from more than one representation proceeding for purposes of display, analysis, or any other purpose and the term "compiled" has the corresponding meaning.

Unless otherwise stated, these requests concern proceedings initiated by RC, RM and RD petitions.

Unless otherwise stated, these requests are for documents concerning representation proceedings initiated subsequent to January 1, 2000.

Requests

1. All compilations of data concerning representation case proceedings initiated under the Final Rule.

2. All analysis of data concerning representation case proceedings initiated under the Final Rule.

3. All data compiled and all analysis of data prepared for the Board in relation to the Request for Information.

4. All data compiled and all analysis of data prepared for Members Miscimarra and/or Johnson in relation to their dissent from the Final Rule.

5. All data compiled and all analysis of data prepared for Members Miscimarra and/or Johnson in relation to their dissent from the Notice of Proposed Rulemaking, 79 Fed. Reg. 7318 (Feb. 6, 2014).

6. All comparisons of data concerning outcomes of representation in cases governed by the Final Rule and representation cases not governed by the final rule.

7. All comparisons of data concerning the number of petitions filed in cases governed by the Final Rule and representation cases not governed by the final rule.

8. All comparisons of data concerning the number of elections conducted in cases governed by the Final Rule and cases not governed by the final rule.

9. All compilations of data or analysis of data concerning the time between filing of petitions and/or any of the following: opening of pre-election hearing, decision and direction of election (or decision and order), election, case closing.

10. All compilations of data or analysis of data concerning withdrawal of representation petitions.

11. All compilations of data or analysis of data concerning the range, mean and median unit size in representation proceedings.

12. All compilations of data or analysis of data concerning the size of units in representation cases.

13. All compilations of data or analysis of data concerning the number and percentage of representation cases that resulted in consent or stipulated election agreements.

14. All compilations of data or analysis of data concerning requests for continuances of the hearing date in representation cases under the Final Rule.

15. All requests for continuances of hearing dates in representation cases processed under the Final Rule.

16. All compilations of data or analysis of data concerning requests for extensions of time to file and serve position statements under the Final Rule.

17. All requests for extensions of time to file and serve position statements and ruling on such requests under the Final Rule.

18. All compilations of data or analysis of data concerning requests to preclude a party from raising or contesting an issue or presenting evidence based on a failure to timely raise the issue in a position statement or response to a position statement under the Final Rule.

19. All compilations of data or analysis of data concerning the preclusion of a party from raising or contesting an issue or presenting evidence based a failure to timely raise the issue in a position statement or response to a position statement under the Final Rule or nonpreclusion under similar circumstances.

20. All compilations of data or analysis of data concerning motions for a stay of an election or other extraordinary review or relief.

21. All compilations of data or analysis of data concerning cases processed under the Final Rule in which the unit described in the initial notice of election did not include employees included in the unit (or permitted to vote subject to challenge) as described in the final notice of election.

22. Copies of all decisions and directions of elections issued under the Final Rules in cases in which the unit described in the initial notice of election did not include employees included in the unit (or permitted to vote subject to challenge) as described in the final notice of election.

23. All rulings on requests to preclude a party from raising or contesting an issue or presenting evidence based on a failure to timely raise the issue in a position statement or response to a position statement under the Final Rule.

24. All compilations of data or analysis of data concerning hearings conducted in representation cases, including, but not limited to, the percentage of cases in which hearings were held, whether evidence was introduced at the hearing (other than the position statement), and the number of days of hearing.

25. All compilations of data or analysis of data concerning regional directors' pre-election resolution of disputes concerning supervisory status, managerial status, professional status, guard status or other matters concerning eligibility to vote or inclusion in the unit.

26. All compilations of data or analysis of data concerning regional directors' or the Board permitting employees whose eligibility to vote is in dispute to vote subject to challenge.

27. All compilations of data or analysis of data concerning rulings by hearing officers or regional directors refusing to permit parties to introduce evidence concerning the eligibility or inclusion of individuals on the grounds that the number of individuals in dispute was a small percentage of the employees in the unit.

28. All compilations of data or analysis of data or any other documents concerning rulings by hearing officers or regional directors refusing to permit parties to introduce evidence concerning any issue.

29. All compilations of data or analysis of data concerning rulings by hearing officers or regional directors under the Final Rule concerning requests not to continue a hearing from day to day or for any other forms of continuance or delay.

30. All compilations of data or analysis of data concerning the filing of post-hearing briefs.

31. All compilations of data or analysis of data concerning hearing officers or regional directors' denying requests to file post-hearing briefs or denying in whole or in part the full time requested by a party to file a post-hearing brief.

32. All compilations of data or analysis of data concerning employer requests for an extension of time to serve and/or file eligibility lists.

33. All compilations of data or analysis of data concerning objections based on defects in service and/or filing and/or contents of eligibility lists.

34. All compilations of data or analysis of data concerning the time between the closing of hearings and/or filing of post-hearing briefs and issuance of the decision and direction of election (or decision and order).

35. All compilations of data or analysis of data concerning the time between the issuance of the decision and direction of election and the election date.

36. All compilations of data or analysis of data concerning the filing and disposition of pre-election requests for review.

37. All pre-election requests for review filed under the Final Rule that were dismissed as moot or otherwise mooted by the election results.

38. All decisions and directors of elections issued under the Final Rule in proceedings where employees whose eligibility was in dispute were permitted to vote subject to challenge and where the dispute was mooted by the elections results or the failure of the disputed employees to vote.

39. All compilations of data or analysis of data concerning withdrawal of pre-election requests for review, grants of pre-election review and/or disposition of pre-election requests for review.

40. All compilations of data or analysis of data concerning the number or percentage of challenged ballots and/or the number and percentage of challenged ballots that were ruled on by a hearing officer, regional director, administrative law judge or the board.

41. All compilations of data or analysis of data concerning the number or percentage of cases in which objections were filed, hearing were conducted concerning objections, and/or a hearing officer, regional director, administrative law judge or the board ruled on objections.

42. All compilations of data or analysis of data concerning the number or percentage of cases in which a post-election request for review was filed and/or the disposition of such requests.

43. All compilations of data or analysis of data concerning the number or percentage of cases in which the Board overturned a hearing officer's, regional director's, or administrative law judge's ruling on challenges or objections in proceedings not governed by the Final Rule.

44. All compilations of data or analysis of data concerning whether elections were conducted by mail or manually.

45. All compilations of data or analysis of data concerning the outcome of representation proceedings.

46. All compilations of data or analysis of data concerning the number or percentage of votes cast in favor of and/or against representation in elections.

47. All compilations of data or analysis of data concerning the time between the tally of ballots and the opening of post-election hearings and/or disposition of challenges or objections by the regional director and/or the Board.

48. All compilations of data or analysis of data concerning the number or percentage of representation cases that resulted in technical refusals to bargain and a Board finding that the employer violated Section 8(a)(5).

49. All compilations of data or analysis of data concerning blocking charges.

50. All compilations of data or analysis of data concerning any form of complaint concerning labor organization's use of eligibility lists.

Copies of any charge or any form of complaint concerning a labor organization's use of an eligibility list.

Thank you for your attention to this matter.

Sincerely,

Craig Becker
General Counsel

Filed online at https://foiaonline.regulations.gov/foia/action/public/home, by facsimile to (202) 273-FOIA (3642) and by first class U.S. mail to the above address

American Federation of Labor and Congress of Industrial Organizations
815 16th St., NW
Washington, DC 20006
202-637-5000
aflcio.org

AFL-CIO
AMERICA'S UNIONS

February 26, 2018
By e-mail

The Honorable Marvin Kaplan, Chairman
National Labor Relations Board
1015 Half St., SE
Washington, DC 20570

Re: Request for Information Concerning Representation Case Procedures, RIN 3142-AA12

Dear Chairman Kaplan:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), I hereby request a 30-day extension of time to respond to the National Labor Relations Board's December 14, 2017, Request for Information concerning the National Labor Relations Board's representation case procedures.

On December 22, promptly after the publication of the Request for Information, we requested relevant data from the Board pursuant to the Freedom of Information Act (FOIA), initiating FOIA Case No. NLRB-2018-000296. *See* Attachment 1. We asked that the response to our request be expedited and that responsive documents be provided by January 26, 2018, given the original due date set by the Board of February 12, 2018. On December 27, 2017, the Board granted our request for expedited processing. Nevertheless, to date we have not received any of the requested data.

The current due date for submissions responsive to the Board's Request is March 19. Even immediate receipt of the requested information now would not give us sufficient time to evaluate the data in order to provide the Board the meaningful information it needs to evaluate whether or not to make any changes to the representation case procedures.

For these reasons, we ask that the date for submissions be extended up to and including April 18, 2018.

Thank you for your consideration.

Sincerely,

/s/Craig Becker
Craig Becker
General Counsel
(202) 637-5310
cbecker@aflcio.org

cc: Gary Shinners, Executive Secretary, NLRB

From: (b) (6)
To: Kaplan, Marvin E.
Subject: Re: ABC Legal Conference Invite
Date: Tuesday, April 24, 2018 2:17:13 PM

Thanks!

On Apr 24, 2018, at 1:13 PM, Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov> wrote:

> Yes, you can.
>
> ---
>
> **From:** (b) (6) @abc.org>
> **Sent:** Tuesday, April 24, 2018 1:33:57 PM
> **To:** Kaplan, Marvin E.
> **Subject:** RE: ABC Legal Conference Invite
>
> Hi Marvin (Board Member Kaplan):
> Are you cool with us using your name in marking materials. You're a draw!
>
> ---
>
> **From:** (b) (6)
> **Sent:** Tuesday, April 10, 2018 11:25 AM
> **To:** Marvin.Kaplan@nlrb.gov
> **Cc:** (b) (6) @abc.org>
> **Subject:** RE: ABC Legal Conference Invite
>
> Marvin:
>
> Thank you again for agreeing to speak at ABC's Legal Conference on June 28 at 9 a.m. at the Hyatt Regency Washington on Capitol Hill .
>
> **9-9:45 a.m. – An Inside View of the NLRB**
> A board member will provide an update on significant recent National Labor Relations Board (NLRB) rulemakings and decisions that impact construction industry contractors, as well as discuss the overall direction of the NLRB for 2018.
>
> I was wondering if ABC could use your name in Legal Conference marketing materials as well as in the above session description posted on the ABC Legal Conference website?
>
> Also, we are currently working on our onsite program for this year's conference, and I would like to include your bio and photo in the program. I found the following bio on the NLRB website, (https://www.nlrb.gov/who-we-are/board/marvin-kaplan) - should we use this? Would you mind sending me your headshot to use for the program?
>
> Thank you again, and please do not hesitate to contact me with any questions.

Sincerely,

(b) (6)
(b) (6), Government Affairs
Associated Builders and Contractors, Inc.
440 First St., N.W., Ste. 200
Washington, D.C. 20001
Phone: (b) (6)

From:	Rothschild, Roxanne L.
To:	Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William; (b) (6)
Cc:	Lucy, Christine B.
Subject:	ABA Labor & Employment Law Conference Board session discussion
Date:	Tuesday, September 18, 2018 3:53:04 PM
Attachments:	Press Release - Board Proposes Rule to Change its Joint-Employer Standard.pdf Federal Register publication of NLRB Notice of Proposed Rulemaking regarding Joint-Employer Standard 9-14-2018.pdf Notice and Invitation to file briefs in Caesars Entertainment Corp.pdf Notice and Invitation to file briefs in Loshaw Thermal Technology.pdf Press Release - NLRB Launches Pilot of Proactive Alternative Dispute Resolution (ADR) Program.pdf ADR ALJD Issuance Insert Pilot Proactive Program.pdf Press Release - NLRB Administrative Law Judges Validly Appointed.pdf Press Release - NLRB to Undertake Comprehensive Internal Ethics and Recusal Review.pdf

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All:

Below is the list of topics discussed during this morning's call for the Board's session at the ABA's Labor & Employment Law Conference on November 8, 2018.

- Rulemaking regarding the Board's Joint-Employer Standard (comment period closes 11/13/2018)
- Requests for briefing in Caesar's and Loshaw
- Enhanced Board ADR Program
- Boeing & Murphy Oil cases – what the Board is doing to handle these cases
- Status of comments on the Election Rule Request for Information
- ALJ Appointments found to be valid

I have also attached documents that the Board may wish to provide to the ABA as documents to be distributed to conference attendees. The documents attached are:

- Press Release re: Board's proposal to change its Joint-Employer Standard
- Federal Register publication of Board's Notice of Proposed Rulemaking re: Joint-Employer Standard
- Notice and Invitation to File Briefs in Caesar's Entertainment Corp.
- Notice and Invitation to File Briefs in Loshaw Thermal Technology Corp.
- Press Release re: Enhanced ADR Program
- ADR promotional flyer that is sent out when ALJ Decisions issue
- Press Release re: ALJs validly appointed

I have also attached the Press Release regarding the comprehensive internal ethics and recusal review. I didn't know if you would want to talk about this or include this document.

I will schedule another call to include (b) (6) for sometime in October. I will also set up a

meeting with Lori Ketcham to take place shortly before the ABA conference to cover reminders regarding ethical obligations as to the speaking engagements.

Thanks,

Roxanne Rothschild
Deputy Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From: (b) (6)
To: Rothschild, Roxanne L.
Cc: Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William; Lucy, Christine B.
Subject: Re: ABA Labor & Employment Law Conference Board session discussion
Date: Tuesday, September 18, 2018 4:06:33 PM

Thank you, Roxanne. I appreciate your follow up email from today's conference call. I will review and share with (b) (6)

(b) (6)

Sent from my iPhone

> On Sep 18, 2018, at 3:53 PM, Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov> wrote:
>
> All:
>
> Below is the list of topics discussed during this morning's call for the Board's session at the ABA's Labor & Employment Law Conference on November 8, 2018.
>
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> Thanks,
>
> Roxanne Rothschild
> Deputy Executive Secretary
> National Labor Relations Board
> 1015 Half Street SE, Office 5010, Washington, DC 20570
> roxanne.rothschild@nlrb.gov<mailto:roxanne rothschild@nlrb.gov> | 202-273-2917
>
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> <Notice and Invitation to file briefs in Caesars Entertainment Corp.pdf>
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> <Press Release - NLRB Launches Pilot of Proactive Alternative Dispute Resolution (ADR) Program.pdf>
> <ADR ALJD Issuance Insert Pilot Proactive Program.pdf>
> <Press Release - NLRB Administrative Law Judges Validly Appointed.pdf>
> <Press Release - NLRB to Undertake Comprehensive Internal Ethics and Recusal Review.pdf>

From:	Rothschild, Roxanne L.
To:	(b) (6) @levyratner.com); (b) (6)
Cc:	Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William
Subject:	ABA Conference - Board panel session
Date:	Thursday, October 25, 2018 11:58:26 AM

(b) (6)

FYI – the Chairman and the Board Members have divvied up the topics that were discussed for the ABA conference. We will be meeting with our Agency Ethics Officer next week to go over the topics as well as speaking engagement "do's & don'ts" for the conference. The Chairman thought it made sense to just have a quick meeting in San Francisco with both of you prior to the panel presentation to let you know who would be covering which topics during the session. They also plan to prioritize the order of the topics listed below in case time does not allow for all of the topics to be covered. Just so you know, they have asked me to speak on the subject of the Board's enhanced ADR pilot program because that program is run by my office. I'm not sure where the ADR program will end up in the list of priorities.

Please let me know if this works for you.

At this point, the topic assignments are as follows. Please note that this list does not yet represent the priority order.

1. Joint Employer Rulemaking - Chairman Ring
2. *Caesars/Rio All-Suites* Notice & Invitation to File Briefs to address the standard set forth in *Purple Communications* re: employees' nonwork-related use of employer email systems - Member Kaplan
3. *Loshaw* Notice & Invitation to File Briefs to address 8(f)/9(a) collective bargaining relationships in the construction industry (plus possibly the pending motion to dismiss the charge) - Chairman Ring
4. Boeing – Member Kaplan
5. Murphy Oil - Member Emanuel
6. ALJ Appointments (Board's decision in *WestRock Services*, 10-CA-195617 finding that the NLRB ALJ's are validly appointed) – Member McFerran
7. Internal Ethics and Recusal Review - Chairman Ring first, then Member Emanuel
8. Board's ADR program – Roxanne Rothschild
9. Election rules RFI/rulemaking status - Member Emanuel

Thank you,

Roxanne Rothschild

Acting Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From: (b) (6)
To: Rothschild, Roxanne L.; (b) (6) @levyratner.com)
Cc: Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William
Subject: RE: ABA Conference - Board panel session
Date: Thursday, October 25, 2018 1:59:58 PM

Thanks, Roxanne. (b) (6) and I will put our heads together to come up with softball questions to introduce the topics. We will share them with everyone well in advance of San Francisco for review/comment. Meeting before our presentation sounds great.

Have a great day and thanks again.

(b) (6)

(b) (6) (b) (6)
Partner
(b) (6) @FaegreBD.com Download vCard
D:(b) (6) | F: +1 317 237 1000
Faegre Baker Daniels LLP
300 N. Meridian Street | Suite 2700 | Indianapolis, IN 46204, USA

From: Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov>
Sent: Thursday, October 25, 2018 11:58 AM
To: (b) (6) @levyratner.com) (b) (6) @levyratner.com>; (b) (6) (b) (6) @FaegreBD.com>
Cc: Ring, John <John.Ring@nlrb.gov>; McFerran, Lauren <Lauren.McFerran@nlrb.gov>; Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>; Emanuel, William <William.Emanuel@nlrb.gov>
Subject: ABA Conference - Board panel session

(b) (6) :

FYI – the Chairman and the Board Members have divvied up the topics that were discussed for the ABA conference. We will be meeting with our Agency Ethics Officer next week to go over the topics as well as speaking engagement "do's & don'ts" for the conference. The Chairman thought it made sense to just have a quick meeting in San Francisco with both of you prior to the panel presentation to let you know who would be covering which topics during the session. They also plan to prioritize the order of the topics listed below in case time does not allow for all of the topics to be covered. Just so you know, they have asked me to speak on the subject of the Board's enhanced ADR pilot program because that program is run by my office. I'm not sure where the ADR program will end up in the list of priorities.

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9. Election rules RFI/rulemaking status - Member Emanuel

Thank you,

Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From:	(b) (6)
To:	Rothschild, Roxanne L.; (b) (6) @levyratner.com)"
Cc:	Ring, John; McFerran, Lauren; Kaplan, Marvin E.; Emanuel, William
Subject:	RE: ABA Conference - Board panel session
Date:	Monday, November 5, 2018 9:29:17 AM
Attachments:	ABA Draft NLRB Panel Questions.docx

Everyone,

Good morning! In advance of this week's ABA talk, attached please find a **draft** of our talking points for the panel. Please let us know your questions/comments/concerns so we can tailor the discussion to the Board's preferences.

Thanks!
(b) (6)

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(b) (6) @FaegreBD.com Download vCard
D: (b) (6) | F: +1 317 237 1000
Faegre Baker Daniels LLP
300 N. Meridian Street | Suite 2700 | Indianapolis, IN 46204, USA

From: (b) (6) .
Sent: Thursday, October 25, 2018 2:00 PM
To: Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov>; (b) (6)
(b) (6) @levyratner.com) (b) (6) @levyratner.com>
Cc: Ring, John <John.Ring@nlrb.gov>; McFerran, Lauren <Lauren.McFerran@nlrb.gov>; Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>; Emanuel, William <William.Emanuel@nlrb.gov>
Subject: RE: ABA Conference - Board panel session

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Faegre Baker Daniels LLP
300 N. Meridian Street | Suite 2700 | Indianapolis, IN 46204, USA

From: Rothschild, Roxanne L. <Roxanne.Rothschild@nlrb.gov>
Sent: Thursday, October 25, 2018 11:58 AM
To: (b) (6) @levyratner.com) (b) (6) @levyratner.com>; (b) (6)
(b) (6) @FaegreBD.com>
Cc: Ring, John <John.Ring@nlrb.gov>; McFerran, Lauren <Lauren.McFerran@nlrb.gov>; Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>; Emanuel, William <William.Emanuel@nlrb.gov>
Subject: ABA Conference - Board panel session

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FYI – the Chairman and the Board Members have divvied up the topics that were discussed for the ABA conference. We will be meeting with our Agency Ethics Officer next week to go over the topics as well as speaking engagement "do's & don'ts" for the conference. The Chairman thought it made sense to just have a quick meeting in San Francisco with both of you prior to the panel presentation to let you know who would be covering which topics during the session. They also plan to prioritize the order of the topics listed below in case time does not allow for all of the topics to be covered. Just so you know, they have asked me to speak on the subject of the Board's enhanced ADR pilot program because that program is run by my office. I'm not sure where the ADR program will end up in the list of priorities.

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Thank you,

Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

SAN FRANCISCO
ABA NLRB PANEL
MODERATOR QUESTIONS

Topic: Joint Employer Rulemaking

Panelist: Chairman Ring

Intro Question: *Chairman Ring, let's first talk about the always complex issue of joint employment. Since Browning-Ferris, the Board's joint employment standard has received a lot of attention – both in the legal community and in the popular discourse. In September, the Board proposed rulemaking related to the joint-employer standard.*

1. *What can you tell us about the status of the rulemaking?*
2. *Why has the Board decided to address this topic via rulemaking rather than just waiting for another case where joint employment is at issue?*
3. *Are there any other issues on the horizon that you think the Board might want to address via rulemaking?*

Topic: Election Rules Rulemaking

Panelist: Member Emmanuel

Intro Question: *One of the most significant initiatives the Board took during the Obama Administration was re-vamping its R case election process. There is now talk that the Board might revisit this issue.*

1. *What can you tell us about the Board's current thinking as to whether it wants again to engage in rulemaking related to is R case procedures?*
   What is driving the Board's thinking in this regard?

Topic: Employees' Use of the Employers' E-Mail Systems

Panelist: Member Kaplan

Intro Question: *Member Kaplan, another hot button issue for employees, labor, and management, is whether employees have a statutory right to use their employers' email systems during non-work time. Pending before the Board is the case Casers Entertainment Corp. d/b/a Rio All-Suites – in which this principle is at the forefront. The Board has invited briefs in this case.*

1. *What can you tell us about this case?*
2. *Do you anticipate that the Board will be soliciting amici briefs more often in the coming years? Why?*

Topic: 9(a) vs. 8(f)

Panelist: Chairman Ring

Intro Question: *Chairman Ring, it goes without saying that there are substantial differences in labor law if an employer is in the construction industry vs. if it is a non-construction industry employer. One of the biggest differences is the concept of 8(f) agreements that permit the parties to "walk away" from their bargaining relationship upon contract expiration. As a practitioner, one of the many curious aspects of the law is the long-standing holding that by mere language along an 8(f) construction agreement can be converted to a 9(a) agreement – even if none of the prerequisites to establishing a 9(a) relationship actually occurred. Recently, the Board has solicited briefs on this issue along with the related issue of whether the Board will entertain a claim that majority status was lacking at the time of 9(a) recognition when more than six (6) months have elapsed without a charge or petition.*

1. *What can you tell us about this case?*
2. *Do you envision the Board revisiting in other cases the issue of when the 10(b) period runs or is tolled?*

Topic: Employee Handbooks

Panelist: Member Kaplan

Intro Question: *Member Kaplan, for the last several years the Board has been extremely active in issuing decisions that validated, or invalidated, a wide variety of common Employee Handbook provisions. Most recently, the Board issued its expansive Handbook decision in Boeing.*

1. *Please discuss the Board's ruling in Boeing and its new framework for analyzing Employee Handbook provisions.*

Topic: Lawfulness of Arbitration Agreements Containing Class-Action Waivers

Panelist: Member Emmanuel

Intro Question: *Member Emmanuel, earlier this year the US Supreme Court issued its landmark decisions in Epic Systems Corp. v. Lewis, Ernst & Young LLP v. Morris, and NLRB v. Murphy Oil USA, Inc.. The Court held that arbitration agreements entered into between employers and employees providing for arbitration to resolve employment disputes are enforceable, and are not rendered unlawful under either the Federal Arbitrations Act ("FAA") or the NLRA. Although the NLRA secures employees' right to organize and bargain collectively, the Court held that the NLRA does not include a right to class or collective actions.*

1. *Please discuss the impact of the Court's decision on the Board and how you see this decision impacting employers, unions, and employees in the future.*

Topic: NLRB ALJ Appointments After *Lucia v SEC*

Panelist: Member McFerran

Intro Question: *Member McFerran, the Supreme Court in Lucia v. SEC held that the SEC's ALJs were not properly Constitutionally appointed. As you can imagine, this decision sent shockwaves throughout the labor law bar because it raised the question about the status of the validity of the NLRB's ALJs.*

1. *What is the NLRB's position as to whether its ALJs are properly appointed?*
2. *How has the NLRB been dealing with subpoena requests, both for documents and testimony, related to the Constitutionality of its ALJs?*

Topic: NLRB Internal Ethics and Recusal Review

Panelists: Chairman Ring and Member Emmanuel

Intro Question: *Chairman Ring and Member Emmanuel, regardless of Administration, among the primary drivers in the erosion of the public's confidence in government are actual or perceived ethics problems.*

1. *What is the Board doing with regard to ensuring that its internal ethics and recusal processes are sound?*

Topic: NLRB's ADR Program

Panelist: Acting Executive Secretary Rothschild

Intro Question: *Acting Executive Secretary Rothschild, it is not fair if the Board has all of the fun up here, so we are going to put you on the hot seat for a moment. Historically, the Board has not emphasized the use of ADR in its litigation processes. This seems to be changing, however.*

1. *Please discuss the NLRB's new ADR initiative.*

From: (b) (6)
To: Kaplan, Marvin E.
Subject: RE: Invitation to Speak/December 6, 2018
Date: Tuesday, November 6, 2018 10:05:51 AM

That's great news, thank you (I will get my little gold star today). Would you like to keynote over lunch? Prefer a different time??

From: Kaplan, Marvin E. [mailto:Marvin.Kaplan@nlrb.gov]
Sent: Tuesday, November 06, 2018 10:04 AM
To: (b) (6)
Subject: Re: Invitation to Speak/December 6, 2018

Ethics has given me the go ahead to accept. See you on December 6th.

From: (b) (6) @littler.com>
Sent: Monday, November 5, 2018 2:35:17 PM
To: Kaplan, Marvin E.
Subject: Invitation to Speak/December 6, 2018

Member Kaplan:

I am writing to inquire of your availability and invite you to speak at an upcoming Workforce Policy Institute client briefing on labor and employment issues, and the regulatory/legislative outlook in the next Congress.

The briefing is scheduled for **Thursday, December 6, from 10:00 to 3:00** at our offices in Washington, DC. We would be looking for you to update the audience on recent developments at the Board, including notable decisions and other guidance (e.g., General Counsel memoranda) issued, as well as to discuss other pending rulemaking and Board activity. We have not yet set an agenda for the day, and are flexible to accommodate your schedule. If you like, we would be delighted to feature you as a keynote speaker. We would hope you would be able to speak for 30-45 minutes, with some time allotted for audience Q&A.

Please let me know at your convenience if you would be interested in presenting at this briefing. If I may provide additional information, please do not hesitate to contact me directly.

We hope you are able to join us on the 6th,

JAP

(b) (6)
(b) (6) direct (b) (6) @littler.com
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Littler | littler.com

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From: Kaplan, Marvin E.
To: (b) (6)
Cc: (b) (6)
Subject: Re: Final Details (NOTE SPEAKING SLOT ADJUSTMENT) - Upcoming Morgan Lewis Labor Law West Conference - Thursday, November 8 (San Francisco)
Date: Monday, November 5, 2018 2:13:54 PM

That is fine. Thank you. Please send me a calendar invite with the pertinent information.

From: (b) (6) @morganlewis.com>
Sent: Monday, November 5, 2018 2:05:55 PM
To: Kaplan, Marvin E.
Cc: (b) (6)
Subject: RE: Final Details (NOTE SPEAKING SLOT ADJUSTMENT) - Upcoming Morgan Lewis Labor Law West Conference - Thursday, November 8 (San Francisco)

Marvin,

How does 9:15 sound? Your panel begins at 10:10 am, so this should allow more than enough time for you to get from the ABA hotel to our office, which is about 1.5 miles apart.

Let me know if that time works for you.

(b) (6)
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From: Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>
Sent: Monday, November 05, 2018 1:57 PM
To: (b) (6) @morganlewis.com>
Cc (@morganlewis.com>
Subject: Re: Final Details (NOTE SPEAKING SLOT ADJUSTMENT) - Upcoming Morgan Lewis Labor Law West Conference - Thursday, November 8 (San Francisco)

[EXTERNAL EMAIL]
I don't know the area very well, but I would like to arrive at the Labor Law West Conference no less than 20 minutes before my presentation. Please let me know what time I should be picked up. My cell phone number is (b) (6)

Marvin

From: (b) (6) @morganlewis.com>
Sent: Monday, November 5, 2018 8:42:16 AM
To: Kaplan, Marvin E.
Cc: Miscimarra, Philip A.

Subject: RE: Final Details (NOTE SPEAKING SLOT ADJUSTMENT) - Upcoming Morgan Lewis Labor Law West Conference - Thursday, November 8 (San Francisco)

Hello Marvin,

I wanted to follow up on the below on what time you would like to be picked up from the ABA Conference Hotel to come to the Labor Law West Conference on Thursday. If you could please provide me with a time and a cell phone number that you can be reached at, I will make those arrangements for you.

Thank you!
(b) (6)

(b) (6)
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From: (b) (6)
Sent: Friday, November 02, 2018 1:30 PM
To: 'Kaplan, Marvin E.' <Marvin.Kaplan@nlrb.gov>
Cc: (b) (6) @morganlewis.com>
Subject: RE: Final Details (NOTE SPEAKING SLOT ADJUSTMENT) - Upcoming Morgan Lewis Labor Law West Conference - Thursday, November 8 (San Francisco)

Hello Marvin,

We are so pleased that you will be joining us next week for our second annual Labor Law West Conference!

I wanted to touch base with you to see if we can make arrangements to get you from the ABA hotel to our San Francisco office and back to the ABA hotel. We are happy to have a car pick you up. If you'd like to take us up on this offer, could you please let me know what time you would like to be picked up from the ABA hotel (the Hilton San Francisco Union Square, 333 O'Farrell Street, San Francisco, CA 94102), and we will arrange to have a car there waiting for you.

Also, if you could provide a cell phone number so that our driver can contact you if need be, that would be great.

Thank you very much,
(b) (6)

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From: Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov>
Sent: Thursday, November 01, 2018 3:37 PM
To: (b) (6) @morganlewis.com>
Cc: (b) (6) @morganlewis.com>; (b) (6)
<(b) (6) @morganlewis.com>
Subject: Re: Final Details (NOTE SPEAKING SLOT ADJUSTMENT) - Upcoming Morgan Lewis Labor Law West Conference - Thursday, November 8 (San Francisco)

[EXTERNAL EMAIL]
Great. Thank you for adjusting the schedule.

From: (b) (6) @morganlewis.com>
Sent: Thursday, November 1, 2018 3:34:12 PM
To: Kaplan, Marvin E.
Cc: (b) (6)
Subject: Final Details (NOTE SPEAKING SLOT ADJUSTMENT) - Upcoming Morgan Lewis Labor Law West Conference - Thursday, November 8 (San Francisco)

Dear Marvin:

(b) (6) and I are looking forward to your appearance at our Labor Law West conference in San Francisco next week on Thursday, November 8 in the Morgan Lewis offices located at One Market, Spear Street Tower, San Francisco, CA 94105-1596. In relation to next week's meeting, we have made some last-minute adjustments in our schedule:

1. We have scheduled you for a separate appearance from 10:10 am to 10:30 am on Thursday, November 8. So instead of a joint appearance spanning 30 minutes (with you and Bill Emanuel) we have scheduled you to speak for 20 minutes during the 10:10-10:30 am slot. (Bill Emanuel will be speaking separately for 20 minutes starting at 11:15 am, and Lauren McFerran and Alice Stock will also be making appearances at later times during the day.) It would be great if you could speak for 10 minutes or so, followed by questions and answers regarding your perspective on your first year at the Board, selected cases and whatever comments you may have regarding other issues. Again, we are hoping that your appearance at our meeting will not require any more work than what you will already be doing in preparation for your appearance at the ABA conference. It would be helpful if you would plan on arriving in the Morgan Lewis offices around 20 minutes before the scheduled starting time.

2. As noted previously, (b) (6) (copied on this email) will be pleased to coordinate with you regarding arrangements for transportation between the Morgan Lewis meeting (One Market, Spear Street Tower, San Francisco, CA 94105-1596) and the ABA hotel (the Hilton San Francisco Union Square, 333 O'Farrell Street, San Francisco, CA 94102). They are

located slightly more than one mile away from one another.

Please let me know to the extent it will be helpful to speak about any of the above issues. You can reach me any time via my cell phone[redacted]

Thank you again and I look forward to seeing you next week!

All the best,

[redacted]

[redacted]
Partner
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From:	(b) (6)
To:	Kyle, John; Stock, Alice B.; Robb, Peter; Ring, John; laura.mcferran@nlrb.gov; Kaplan, Marvin E.; Emanuel, William; Rothschild, Roxanne L.
Cc:	(b) @cwa-union.org (b) @dilworthlaw.com; (b) @musicalartists.org; (b) (6)
Subject:	ABA Committee on Practice and Procedure Under the National Labor Relations Act, NLRB Board and General Counsel sessions.
Date:	Monday, February 4, 2019 3:15:10 PM
Attachments:	NLRB Letter.pdf 2019 Agenda - PP Final.pdf

Good afternoon,

The attached letter is being sent to you on behalf of The ABA Committee on Practice and Procedure Under the National Labor Relations Act regarding the 2019 Midwinter Meeting National Labor Relations Board and General Counsel sessions

Sincerely,

(b)

(b) (6)

(b) (6)

Section of Labor and Employment Law
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ABA Committee on Practice and Procedure
Under the National Labor Relations Act
Midwinter Meeting
February 26 – March 1, 2019
Santa Monica, California

PROGRAM AGENDA

Tuesday, February 26

6:00 – 7:00pm **Welcome Reception at Fairmont Miramar**

Wednesday, February 27

7:30 – 8:30am **Newcomers' Breakfast**

7:30 – 8:30am **Continental Breakfast**

8:30 – 9:00am **Welcome, Introductions and Section Council Report**

9:00 – 10:00am **The National Labor Relations Board: A Year in Review**
This panel will provide an overview of the most significant R and C Cases, with an emphasis on procedural issues.

Speakers: **Amanda Jarrett**, *Staff Attorney, National Labor Relations Board, Washington, DC*
Terence Schoone-Jongen, *Assistant Chief Counsel – Office of Representation Appeals, National Labor Relations Board, Washington, DC*
Jayme L. Sophir, *Associate General Counsel – Division of Advice, National Labor Relations Board, Washington, DC*

10:00 – 11:00am **Joint Employer Determinations**
This panel will discuss the Board's Notice of Proposed Rulemaking regarding joint employer determinations and the implications of the proposed rules for employers and unions.

Speakers: **Peter Finch**, *Davis Wright Tremaine LLP, Seattle, WA*
Richard F. Griffin, Jr., *Bredhoff & Kaiser, Washington, DC*

11:00 – 11:15am **Break**

11:15 – 12:15pm **The Practitioner's View of GC 19-02 and the Board's FY 2019-2022 Strategic Plan**
Two practitioners will discuss the implications of General Counsel Memo 19-02 and the Board's Fiscal Year 2019-2022 Strategic Plan for their respective constituencies.

Speakers: **Johnda Bentley**, *Service Employees International Union, Washington, D.C.*
Ashley Laken, *Seyfarth Shaw LLP, Chicago, IL*

12:15 – 1:15pm **The Duty of Fair Representation after GC Memo 19-01**
The General Counsel recently offered guidance to the regions on the processing of duty of fair representation cases where a union asserts a "mere negligence" defense. This panel will explore the implications of GC Memo 19-01 on unions, employers and employees.

Speakers: **Jennifer Abruzzo**, *Communications Workers of America, Washington, DC*
Lori Armstrong Halber, *Fisher & Phillips, Philadelphia, PA*

1:15 – 2:30pm **Women's Lunch**

Thursday, February 28

7:30 – 8:30am ***How to Take a Case*** **Editors' Breakfast**

7:30 – 8:30am **Continental Breakfast**

8:30 – 9:30am **Persuasive Writing: Making Your Case to the Board**
Two former Board Members will share their views on how practitioners can best present arguments in briefs for the Board's consideration in addition to tips for how to draft comments/responses to Notices of Proposed Rulemaking and Requests for Information that will catch the Board's attention.

Speakers: **Harry Johnson**, *Morgan, Lewis & Bockius LLP, Los Angeles, CA*
Mark Gaston Pearce, *Washington, DC*

9:30 – 11:00am **Meet the National Labor Relations Board**
Join us for an intimate discussion with the Chairman and Members of the National Labor Relations Board.

Speakers: **Hon. John Ring,** *Chairman, National Labor Relations Board, Washington, DC*
Hon. Lauren McFerran, *Member, National Labor Relations Board, Washington, DC*
Hon. Marvin Kaplan, *Member, National Labor Relations Board, Washington, DC*
Hon. William Emanuel, *Member, National Labor Relations Board, Washington, DC*

11:00 – 11:15am **Break**

11:15 – 12:45pm **Recent Developments from the Office of the NLRB General Counsel**
Attendees will have the chance to hear from new General Counsel Peter Robb and learn more about his current and planned initiatives.

Speakers: **Hon. Peter B. Robb**, *General Counsel, National Labor Relations Board, Washington, DC*
John W. Kyle, *Deputy General Counsel, National Labor Relations Board, Washington, DC*
Alice B. Stock, *Associate General Counsel, National Labor Relations Board, Washington, DC*

Moderators: **James Bucking**, *Foley Hoag LLP, Boston, MA*
Susan Davis, *Cohen, Weiss and Simon, LLP, New York, NY*

7:00 – 10:00pm **Reception & Dinner**

Friday, March 1

7:30 – 8:30am **Regional Co-Chair Breakfast**

7:30 – 8:30am **Continental Breakfast**

8:30 – 9:30am **Inside the NLRB Executive Secretary's Office**
Meet the Board's new Executive Secretary, Roxanne Rothschild, who will give practitioners an overview of her role and responsibilities of the Office of the Executive Secretary.

Speaker: **Roxanne Rothschild,** *Executive Secretary, National Labor Relations Board, Washington, DC*

9:30 – 10:30am **NLRB Regional Directors on the Exercise of Discretion**
This panel of Regional Directors will discuss their exercise of discretion in enforcing the Act, in both the R Case and C Case contexts.

Speakers: **William B. Cowen**, *Regional Director, National Labor Relations Board Region 21, Los Angeles, CA*
Mori Rubin, *Regional Director, National Labor Relations Board Region 31, Los Angeles, CA*

10:30 – 10:45am **Break**

10:45 – 11:45am **Board Member Conflicts of Interest and Recusal Determinations**
This panel will discuss the Board's recusal process and standards and explain to practitioners how such standards dovetail with ABA Model Code of Judicial Conduct Rule 2.11: Disqualification.

Speakers: **Philip Miscimarra**, *Morgan, Lewis & Bockius LLP, Washington, DC*
Nancy J. Schiffer, *Pacific Grove, CA*

11:45am – 12:45pm **Rulemaking Versus Adjudication**
Is rulemaking the superior vehicle for changing Board law? Two practitioners will weigh in and ask the audience to join the debate.

Speakers: **Julie Gutman Dickinson,** *Bush Gottlieb, Glendale, CA*
Bryan O'Keefe, *Kirkland & Ellis, LLP, Washington, DC*

12:45 – 1:15pm **P&P Town Hall**

1. Review of program – feedback and suggestions for next year
2. Midwinter Locations – feedback for 2019 and discussion of 2020
3. Annual Section Conference – P&P participation
4. Fall Regional Meetings – suggestions for improvement

5. "Letter-Writing" meeting and follow up with NLRB
6. Diversity issues related to membership, participation and attendance
7. Other Committee activities and possibilities:
    a. Liaison reports
    b. Other interactions with NLRB
    c. Recruiting new members
    d. Hot topics
    e. Newsletter
    f. Other matters

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TO: The Chairman, Members, General Counsel, Chief Administrative Law Judge and Executive Secretary of the National Labor Relations Board

FROM: The ABA Committee on Practice and Procedure Under the National Labor Relations Act

DATE: January 31, 2019

Greetings:

This letter summarizes a number of the questions and concerns raised by practitioners attending our Committee's Regional Subcommittee meetings this past fall. We present them as an outline of issues that we would appreciate the Board and General Counsel addressing at our Committee's upcoming Midwinter Meeting on February 26 – March 1, 2019.

We view the Board and General Counsel sessions as the highlight of our Midwinter Meeting and practitioners greatly appreciate the opportunity to meet with the Board Members, General Counsel and senior staff in this small group setting. This year, we will again be holding sessions with both the Board and the General Counsel, which we hope will ensure that you have ample time to cover all of the issues you wish to address in addition to the matters that we have raised in this letter. We also have attached a copy of our Meeting agenda for your consideration, and again, look forward to your presentations.

I. Unfair Labor Practice Issues.

A. Fiscal Year 2018 Statistics.

1. Please provide the number of ULP charges filed, and for those filed in FY 2018, the settlement rate; the number and percentage of merit dismissals; the number of complaints issued; the litigation win rate; and the percentage of ULP charges filed in which merit was found.

    a. How has the number and rate of merit dismissals changed from FY 2017 to FY 2018?

2. Please provide the median and average time between charge filing and Regional disposition, broken down by Region and as a total.

3. Please provide the median and average time between when a complaint is filed, to when a hearing is held, and from when a hearing is closed until when a decision is issued.

4. Please provide the median and average time between when a case reaches the Board to the issuance of a Board Decision.

5. Please provide the number of Motions for Summary Judgment (MSJs) that were filed as a result of an alleged default in a settlement agreement that included a default provision. What were the results of such MSJs?

6. Please provide separate statistics for FY 2017 and FY 2018 regarding Regional approval of informal Board settlement agreements that included default language with complaint admissions for breach versus settlement agreements for those fiscal years that did not include such language.

7. Please provide separate statistics for FY 2017 and FY 2018 regarding the number of non-Board settlement agreements resulting in adjusted withdrawal requests to resolve a case versus informal Board settlement agreements.

8. Please provide statistics on pre-arbitral and post-arbitral deferrals, including the number of cases deferred and the number of cases not deferred, and the length of time the cases have been pending. Does this represent a change from prior years?

a. In light of GC Memo 19-03, please provide the same statistics on *Dubo* deferrals.

9. Please provide the total number of pre-trial subpoenas *duces tecum* and subpoenas *ad testificandum* issued by the General Counsel and issued by each Region for each fiscal year in FY 2017 and FY 2018.

10. Please provide the number of appeals received by the Office of Appeals; the number and percentage of cases sustained and overturned; the number of CB cases, including the number reversed and the number remanded; the median number of days to process all such cases and those that were sustained; and the average number of days an appeal was pending.

11. Where does the Board plan to publish statistics? Which statistics can be found on the Board's website outside of the Agency's annual Performance and Accountability Report (PAR) and where specifically within the website? Which can be found in the PAR? Where can practitioners access the PAR?

12. What is the average and median length of time a case, which is formally submitted to the Division of Advice, remains there before a final determination from the Division of Advice is provided to the submitting Regional office? What percentage of ULP cases filed in FY 2018 were formally submitted to the Division of Advice? Please provide that same information for FY 2017 cases as well.

13. GC Memo 19-01 stated, "[w]e are seeing an increasing number of cases where unions defend Section 8(b)(1)(A) duty of fair representation charges at the Regional level by asserting a 'mere negligence' defense." Please provide the statistics that demonstrate this increased use of a "mere negligence" defense. Also, please provide the specific cases (case names and numbers) where informal or formal guidance was requested from the Division of Advice concerning this issue.

14. GC Memo 19-02 cited an increase in over-age cases and a decrease in overall case intake from FY 2012 to FY 2018. For those same years, please provide the numbers of Regional staff and the percentage change for Regional staff in those years broken down by managerial/supervisory, professional, and administrative.

B. <u>Section 10(j) and 10(l) Injunctions.</u>

1. Please provide statistics concerning the number of "go" 10(j) injunction cases requested by Region; the number submitted to the General Counsel by ILB; the number submitted to the Board from the General Counsel; the number authorized by the Board; and the number granted by the courts in FY 2016, 2017, and 2018.

2. Please provide statistics regarding the average time between the filing of the charge and when a given Region: submits a request to ILB; receives a directive to file a 10(j) petition; when the petition is filed in district court; the date of any injunction determination; the number that settled before the petition was filed; and the number that settled after the petition was filed.

3. Please provide the number of 10(l) injunction petitions filed in FY 2016, FY 2017, and FY 2018. Please provide statistics regarding the number that settled after the petition was filed for each of those fiscal years.

C. Subpoenas.

1. Please provide FY 2018 statistics regarding the number of investigative subpoenas to obtain testimony and documents that issued as a percentage of total cases where a final Regional determination has been made, as well as the number of related petitions to revoke and success of such petitions. The Committee would also appreciate it if the Agency would provide a similar table as the one provided in response to this question last year.

2. What is the General Counsel's position regarding investigative subpoenas and has there been any formal or informal guidance, provided to the Regions related thereto?

D. Access to Information.

1. What is the status of the Agency's efforts concerning website enhancements to enable counsel to obtain charges and other filings via the website or efforts to publish redacted settlement agreements and other redacted pre-hearing documents on the website?

2. What is the status of the Agency's efforts to create a PACER-type searchable platform or function? Will the Agency create a function, similar to federal court filings, for electronic service on all parties of electronically filed documents?

3. Is the Agency able to electronically post a complete docket of all actions with related documents in pending unfair labor practice trials nationwide? If not, why not? If so, what would it take to actually post this information?

4. What instructions been provided to the Regions and staff regarding updates to the NxGen system over the past year?

5. Concerning the electronic filing system, is there any mechanism for amending or withdrawing charges? If not, is the Agency considering developing such a mechanism?

E. GC Memo 18-02 – Mandatory Submissions to Advice.

GC Memo 18-02 instructed Regions to submit to Advice cases that involved "significant legal issues," including, *inter alia*, any cases "over the last eight years that overruled precedent and involved one or more dissents." For each of the following categories of cases, please provide statistics regarding how many of each category of

such cases have been submitted to Advice to date, the outcome of said cases and describe any trends and the issues presented in these types of cases.

1. Concerted activity for mutual aid and protection (*e.g. Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014) and *Pier Sixty LLC*, 362 NLRB No. 59 (2015)).

2. Common employer handbook rules cases, including those cases falling under the three categories set forward in *The Boeing Company*, 365 NLRB No. 154 (2017).

3. Employee use of employer email systems (*Purple Communications*, 361 NLRB No. 126 (2014)).

4. Work stoppages found protected under the *Quietflex* standard (e.g. *Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB No. 128 (2014); *Nellis Cab Company*, 362 NLRB No. 185 (2015); *Wal-Mart Stores, Inc.*, 364 NLRB No. 118 (2016).

5. Off-duty access to property (*e.g. Capital Medical Center*, 364 NLRB No. 69 (2016) and *Piedmont Gardens*, 360 NLRB No. 100 (2014)).

6. Conflicts with other statutory requirements (*e.g. Cooper Tire & Rubber Company*, 363 NLRB No. 194 and *Pier Sixty, LLC*, 362 NLRB No. 59 (2015)).

7. Weingarten (*e.g. Fry's Food Stores*, 361 NLRB No. 140 (2015), *Howard Industries*, 362 NLRB No. 35 (2015) and *Manhattan Beer Distributors*, 362 NLRB No. 192 (2015) (drug testing context)).

8. Disparate treatment of represented employees during contract negotiations (*e.g. Arc Bridges, Inc.*, 362 NLRB No. 56 (2015).

9. Successorship (*e.g. GVS Properties*, 362 NLRB No. 194 (2015), *Creative Vision Resources*, 364 NLRB No. 91 (2016) and *Nexco Solutions*, 364 NLRB No. 44 (2016)).

10. Duty to bargain before imposing discretionary discipline where parties have not executed initial collective bargaining agreement (*Total Security Management*, 364 NLRB No. 106 (2016).

11. Duty to provide witness statements to union (*Piedmont Gardens*, 362 NLRB No. 139 (2015).

12. Dues check-off (*Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015).

F. Alternative Arguments.

1. Please explain the process of providing alternative arguments when the current General Counsel believes that existing Board precedent should be overruled.

2. Please provide the Board precedent that the current General Counsel believes should be overturned and whether there is currently an active case as to that issue.

3. Please explain the process of advising the public where the current General Counsel disagrees with policy decisions made by the former General Counsel.

4. Please provide those policy decisions about which the current General Counsel disagrees.

5. Concerning the cases listed in GC 18-02 and other cases where the Office of the General Counsel would like Regions to present an alternative argument to existing law, please clarify whether Regions must send such cases to Advice *before* taking a case to the ALJ, or whether it is within the Region's discretion to submit the case only after the case is moving to the Board?

6. To the extent that Counsel for the General Counsel wins, in full, a case litigated before an ALJ, is s/he required to file exceptions or cross-exceptions to the Board in order to present alternative arguments for overruling case precedent?

7. Have there been any cases in FY 2017 and FY 2018 in which the Division of Enforcement-Litigation advised the court that the NLRB is now taking a different position than the one initially provided to the court. If so, please provide the case names and court docket numbers.

8. Does the Division of Advice provide a template of the arguments to be made regarding the issues flagged in GC 18-02? To the extent that it does provide a template as to some, but not all, issues, for which issues are there templates?

G. GC Memo 19-01 – Duty of Fair Representation.

1. Pursuant to GC 19-01, a union's failure to respond to inquiries for information or documents by the charging party would amount to arbitrary conduct unless the union can show that it had a "reasonable excuse" or "meaningful explanation." Please provide further explanation on what is "reasonable."

2. GC 19-01 and ICG 18-09 are not entirely consistent. Please confirm that practitioners may rely upon GC 19-01 as the ultimate guidance for them in this area.

3. Has there been any further guidance, formal or informal, provided to the Regions on GC 19-01 and/or ICG 18-09? If so, please provide a copy(ies).

4. Former General Counsel John Irving issued a GC Memo on the duty of fair representation as well (GC 79-55). Since it was not referenced in GC 19-01 or ICG 18-09, please confirm that the guidance in GC 79-55 has not been supplanted by the aforementioned memos.

H. <u>General Case Processing Issues.</u>

1. Are in-person affidavits still preferred during any investigation? Under what circumstances are telephonic or other means of obtaining witness testimony/information preferred/allowed during investigations? Has there been any formal or informal guidance provided to the Regions regarding the types of cases that are suitable for non-face-to-face affidavits? If so, please provide a copy of any such guidance.

2. GC Memo 19-02 eliminated the Impact Analysis program and the "end of month" system followed by most Regions and left it to the Regions to determine how to meet the Agency's new goal of reducing case processing time by five percent (5%) per year for each of four years.

    a. Have there been any specific requirements provided to the Regions that each one has to follow to ensure some casehandling consistency? If so, what are they?

    b. The memo encourages "more extensive use of technological resources." Please explain what these are.

    c. What case processing changes have been implemented thus far in the Regions in order to meet the 5% goal?

    d. Is there any bargaining ongoing with regard to some contemplated case processing changes that may delay implementation? If so, what are those contemplated changes?

3. What advice, if any, is provided to the Regions concerning consulting with charging parties before settlement is reached with a charged party? Do such discussions occur

before or after discussion with the charged party? What guidance is given to Regions over this issue?

4. What guidance, if any, has the Office of the General Counsel provided to Regions concerning merit dismissals during FY 2018 and/or FY 2017?

5. Were there any cases in FY 2017 and FY 2018 where a charged party was found to have violated the Act during the six-month period of time that a merit dismissal remained active, such that a complaint issuance was authorized for the initial merit dismissal allegation(s). If so, please provide the case names and numbers.

II. Remedies.

A. GC Memo 18-02 notes that Regions have been instructed to submit to Advice issues concerning remedies, such as recovering search for work and interim employment expenses (*King Soopers*, 364 NLRB No. 93 (2016)) and requiring employers to remit unlawfully withheld dues without being able to recoup them from employees (*Alamo Rent-a-Car*, 362 NLRB No. 135 (2015)). Does the General Counsel's office plan to continue to seek such remedies? If not, will any guidance be provided for the Regions and practitioners on these issues?

B. What current formal or informal guidance, if any, has been given to Regions regarding inclusion of default language leading the complaint allegation admissions for breach in informal Board settlement agreements? Please provide such guidance.

C. What formal or informal guidance have the Regions been given regarding discretion to include non-admissions clauses in settlement agreements? If there has been guidance given, what was it?

III. Representation Cases.

A. Statistics.

1. Please provide statistics concerning the number of RC and RD **and UC** petitions filed in FY 2018; the number of elections conducted in each category; and the union win rate.

2. Please provide statistics concerning the median number and average number of days from petition to election and from election to certification of representation or election

results and re-run elections, with a comparison to the number of median and average days in prior years.

3. How many petitions were filed where user and supplier employees were petitioned for in the unit (*Miller and Anderson* cases) and, of those cases, how many resulted (through stipulation or decision) in a unit consisting of both user and supplier employees?

4. Please provide statistics concerning the average unit size sought in RC petitions over the last five years.

5. Please provide statistics concerning the average unit size determined to be appropriate in RC cases over the last five years.

6. Please provide statistics on the number of requests for stays in election cases and the number of cases in which the Board granted review.

7. Please provide statistics concerning the use of mixed, mail, and manual ballots. Have mail ballot elections increased? Has any guidance been provided regarding return time for mail ballots? Is consideration given to posting mixed, mail, or manual ballots statistics on the Board's website?

B. <u>Election Rules.</u>

1. What is the status of rule-making concerning the Agency's election rules? Are any changes being contemplated through rulemaking or otherwise? If so, what are they?

2. For FY 2018, what is the median time from:

   a. Filing to election overall?

   b. Filing to election in Stipulated Agreement cases?

   c. Filing to election in DDE cases?

3. What is the total number and percentage of stipulated elections in FY 2018? How does that compare to FY 2016 and FY 2017?

   a. What is the total number and percentage of withdrawn petitions in FY 2018? How does that compare to FY 2016 and FY 2017?

b. What is the total number and percentage of blocking charges in FY 2018? How does that compare to FY 2016 and FY 2017?

1. For cases subject to blocking in FY 2018, what is the average and median delay before the election was held?

c. Has guidance been issued on extensions of time on hearings (beyond the applicable 8-day period) to allow parties to negotiate stipulations? How many extensions have been granted, and under what circumstances? Are any changes anticipated to be forthcoming?

d. How many no-issue, pre-election hearings were held in FY 2018? How does that compare to FY 2016 and FY 2017?

C. In GC 18-06, Regions were advised not to object should a RD petitioner wish to intervene in a hearing. Have there been any cases where Regions received such a request? If so, in those cases, did the RD petitioner or representative appear and participate in the hearing?

D. Rule-Making.

1. Concerning rule-making generally, does the Board have plans for further rule-making? If so, what issues are being contemplated and what is the anticipated timing of such future rule-making?

2. In light of the D.C. Circuit's December 28, 2018 decision in Browning Ferris Industries, what is the status of rule-making concerning joint employers?

a. Does the Board plan to extend the comment period deadline beyond January 28, 2019 on its Notice of Proposed Rulemaking on the joint-employer standard?

IV. Questions Concerning Potential Reorganization of Field Operations and Changes to Case Handling Procedures.

A. Which of the proposed changes from Beth Tursell's January 29, 2018 Case Processing Memo have been, or are soon to be, implemented in the Regions?

B. Are there plans to implement further case processing changes? If so, which specific changes are planned over this fiscal year?

C. In response to last year's letter, the Agency stated that "[c]hanges related to the structure of the Field will be open for public comment prior to implementation, as appropriate." Are there any changes contemplated or planned relating to the structure of the Field? If so, what are they and will there be public comment before potential implementation?

D. As to potential changes to the C-Case, R-Case and/or Compliance Case Handling Manual(s), is the Agency amenable to sharing proposed changes and allowing the Committee to comment prior to issuing any update(s)?

E. As to potential centralization of the drafting of R-Case decisions, of information officer duties, and of compliance officer duties, is the Agency amenable to sharing its plans and allowing the Committee to comment prior to implementing any changes?

F. How does the General Counsel's office determine which memos are released to the public, and which ones remain internal?

V. Staffing.

A. What were the results of the plan to offer buyouts to overstaffed Regions in order to hire in understaffed Regions?

B. Please provide statistics on the current managerial/supervisory, professional and administrative staffing levels at each of the Regional offices.

C. Practitioners in several locations reported information on whether their Regions were "overstaffed" or "understaffed." Please provide the Agency's formula for determining overstaffing and understaffing and provide the Agency's data as to each Region's managerial/supervisory, professional and administrative staffing compared to optimal numbers pursuant to the formula.

D. The General Counsel advised that postings for Regional Directors in Regions 1 and 5 will go up shortly. As to Regions 8 and 9 where there are, or will shortly be, Regional Director vacancies, will there be postings for Regional Directors in those Regions? If so, what is the timing? If not, is there a plan to assign current Regional Directors to also oversee the offices in those Regions and, if so, please identify the current Regional Directors that will be tasked with overseeing those Regions.

E. Is there a "pilot program" for shared regional leadership in any locations? If so, please explain the location of such and the contours of the program.

F. Are there plans for consolidations, closures, reductions in space and/or reductions in FTEs in any of the Regions or at Headquarters? If so, what are they and will the Committee have an opportunity to comment before any final implementation?

G. What is the ratio of employees to supervisors in the Regions for FY 2017 and FY 2018?

1. What is the optimal ratio of employees to supervisors?

2. What is the optimal number of managers in each Region?

3. Have any Regions been given authority to fill vacancies? If so, which Regions and for which positions?

4. Have any Headquarters (GC-side) offices been given authority to fill vacancies? If so, which ones and for which positions?

5. Have any Headquarters (Board-side) offices been given authority to fill vacancies? If so, which ones and for which positions?

6. Are there plans to authorize more hiring in the Regions during FY 2019? If so, where and what positions?

7. Are there plans to authorize hiring in Headquarters (GC-side) during FY 2019? If so, where and what positions?

8. Are there plans to authorize hiring in Headquarters (Board-side) during FY 2019? If so, where and what positions?

H. Please identify which Regions have compliance officers in residence. For any Regions that do not have a compliance officer onsite, is the work being performed intra-Region or inter-Region? If inter-Region, please identify the Region. Does the Agency have plans to hire or promote workers for compliance officer work in those Regions without one?

VI. <u>Strategic Plan FY 2019-FY 2022.</u>

A. The Agency lists “enhanced performance for the resolution of all unfair labor practice charges” as one of its initiatives for the next five years. (Goal #1, Initiative #2). The Agency seeks to reach that goal by decreasing the time Regions are given to resolve ULPs by five percent (5%) per year.

1. How will the Agency ensure that the quality of casehandling is not diminished through the five percent (5%) per year reduction standard?

B. In an effort to "[e]nsure that all matters before the Agency are handled in a fair and consistent manner," the Agency proposes to "[e]nsure that Regional case processing procedures evolve with the Agency's strategic goals and technological advancements." (Goal #1, Initiative #3).

1. How will the Agency ensure consistency in casehandling among and between Regions?

2. What technological advancements are contemplated to assist in case processing and how do they include improvements to case processing procedures?

C. The Agency seeks "[r]ight-sizing and closing Field Offices and Headquarters office space by up to 30% over the next five years… ." (Goal #4, Initiative 4). How does the Agency plan to identify offices for closure? What type of public notice will the Agency provide before closing additional offices? Will the Agency accept public input before closing additional offices?

D. In the External Factors section of the Strategic Plan, the Agency states "[b]ased on historical data, it is projected that overall case intake will reduce by between 500 and 1,000 cases in FY2019." Please provide the "historical data" that supports this.

VII. Miscellaneous.

A. Are there plans to release a GC and/or OM memo regarding hiring halls?

B. Practitioners in several areas of the country continue to be concerned about the unavailability of hearing dates from the Division of Judges. In response to this issue in last year's letter, the Agency wrote that it "is reviewing the trial assignment process to find ways to make it more efficient." What efforts, if any, are being made to make hearing dates more available to parties? Have any changes been made to make the trial assignment process more efficient?

C. In light of *Lucia v. SEC*, 585 U.S. ___, 138 S. Ct. 2044 (2018), have any Respondents raised issues on the appropriate assignment of NLRB Administrative Law Judges?

D. What is the current policy for referral of cases to the National Mediation Board?

E. Several practitioners expressed concern over the frequency and timing of problems with the Agency's website. Sporadic downtime occasionally interferes with practitioners' ability to timely file documents. Is the Agency aware of these concerns and, if so, what steps have been taken to reduce/eliminate these issues?

F. On June 8, 2018, the Agency announced that it would undertake a comprehensive review of its policies and procedures governing ethics and recusal requirements for Board Members. What is the status of that review?

G. On July 10, 2018, the Agency announced it is launching a new pilot program to enhance the use of its Alternative Dispute Resolution (ADR) program, which would increase participation opportunities for parties in ADR and help to facilitate mutually-satisfactory settlements. What is the Board's experience with parties requesting to participate in the ADR program since July 10? How many cases have been referred to ADR since then, identified by region and stage of case processing (pre-complaint, pre-hearing, post-hearing, etc.)? On a per-region basis, have more parties sought to use ADR, and have more cases been resolved through ADR, than previously? According to the Agency's website, the ADR program can provide parties with more creative, flexible, and customized settlements of their disputes. Has the Board modified any of its standards for accepting a resolution reached through the ADR program?

H. The Board has issued several Notices to Show Cause pursuant to several cases implicating the decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). Please provide information on how many and which cases have been remanded; how many and which cases have not been remanded; and for those remanded, was only the rule issue under remand or the entire decision? Are the cases being bifurcated such that the Board will consider the other allegations and issue a decision despite the fact that a rule issue may have been remanded to the ALJ?

From: Kaplan, Marvin E.
To: (b) (6)
Subject: Re: Draft Employment Conference Invitation - Save the Date
Date: Monday, February 4, 2019 12:26:11 PM

These look fine. I look forward to presenting.

I like the question and answer format. Keeps me on topic. I can be a little bit of a nerd and get stuck in the weeds.

From: (b) (6) @gibbonslaw.com>
Sent: Monday, February 4, 2019 12:21 PM
To: Kaplan, Marvin E.
Subject: FW: Draft Employment Conference Invitation - Save the Date

Some suggested topics below UNLESS you prefer to give prepared remarks. Please let me know if we can discuss today at your convenience.

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Sent: Friday, February 1, 2019 4:04 PM
To: (b) (6) @gibbonslaw.com>; (b) (6) @gibbonslaw.com>
Cc: (b) (6) @gibbonslaw.com>
Subject: RE: Draft Employment Conference Invitation - Save the Date

I was thinking we can do a question and answer session. Before we actually draft the questions, however, I'd like to know the topics about which he is authorized to speak and comfortable speaking.

Assuming everything is on the table, my order of preference of topics to address is listed below. Once

we know which topics we can choose from, I can craft some questions that we can run by him about those topics to make sure he is authorized to answer and comfortable answering. It would be great if we could address all topics with just a couple of questions about each although that might be a bit aggressive considering the time constraints.

1. Joint Employer Standard (Notice of Proposed Rulemaking)
2. Independent-Contractor Standard (*SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)
3. Workplace Rules
    a. Standard for Examining Workplace Rules (*The Boeing Co.*, 365 NLRB No. 154 (2017))
    b. Employer Email Systems (*Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel & Casino*, Case No. 28-CA-060841 and*Purple Communications*, 361 NLRB 1050 (2014))
    c. Repudiating Unlawful Workplace Rules (*TBC Corp.*, 367 NLRB No. 18 (2018))
4. Election Rules (Request for Information Regarding Election Regulations)
5. Community of Interest Standard (*PCC Structurals*, 365 NLRB No. 160 (2017))
6. Protected Concerted Activity (*Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019))
7. Time for Determining "Perfectly Clear" Successorship (*First Student Inc.*, 366 NLRB No. 13 (2018))
8. Standard for Evaluating Charged Party's Proposed Settlement Terms (*UPMC*, 365 NLRB No. 153 (2017))
9. Duty to Bargain over Changes Consistent with Past Practice (*Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017))

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CLE INFORMATION

CLE credits will be offered
at this program.

HR CREDIT

This program is pending approval for HRCI and SHRM credits.

Topics of discussion include:

- Recent Case Law and Legislation to Watch in 2019
- Navigating the New Requirements of Paid Sick Leave
- Arbitration and Class Action Waivers
- Marijuana in the Workplace
- Training and Compliance Best Practices
- Restrictive Covenants and the Protection of Confidential Information
- Wage and Hour Updates and Trends
- Sex Harassment Investigations, Assessments and Remedial Measures
- Pre-litigation and Litigation Strategies
- Equal Pay Act

Featuring a keynote address by:

Marvin E. Kaplan
Former Chair and Current Member of the
National Labor Relations Board

Gibbons is headquartered at One Gateway Center, Newark, NJ 07102; (973) 596-4500

From: (b) (6)
To: (b) (6)
Subject: DLL Committee Midwinter Meeting - FEBRUARY 24-27
Date: Tuesday, February 19, 2019 12:16:24 PM
Attachments: Roster.pdf
Agenda - FINAL.pdf

Dear Meeting Registrant:

Please find attached the Agenda and Roster for the 2019 DLL Committee Midwinter Meeting, which is being held at the Fairmont Miramar in Santa Monica, California, beginning Sunday, February 24.

The papers and other materials for the meeting are posted on the meeting website at www.ambar.org/DLLpapers. Additional materials will be posted as received.

I look forward to seeing you in Santa Monica.

Safe travels!

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ABA Section of Labor and Employment Law
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ABA COMMITTEE ON DEVELOPMENT OF THE LAW
UNDER THE NATIONAL LABOR RELATIONS ACT
2019 MIDWINTER MEETING
SANTA MONICA, CALIFORNIA
FEBRUARY 24-27, 2019

PROGRAM AGENDA

GET YOUR LABOR LAW KICKS ON ROUTE 66!

SUNDAY, FEBRUARY 24

3:00 p.m. – 5:00 p.m. **Registration (*Starlight Foyer*)**

3:30 p.m. – 5:00 p.m. ***I Need a Lawyer!* The Ethical Considerations of the Representation of Individual and Corporate Witnesses Before the Board (*Starlight Ballroom*)**

Management: **Amy Moor Gaylord**
Franczek Radelet P.C.

Union: **Angie Cowan Hamada**
Allison, Slutsky & Kennedy P.C.

6:00 p.m. – 6:30 p.m. **First-time Attendee Reception (*Front Drive*)**

6:30 p.m. – 8:00 p.m. **Welcome Reception (*Front Drive*)**

MONDAY, FEBRUARY 25

7:00 a.m. – 8:00 a.m. **Breakfast Buffet (*Deck*)**

8:00 a.m. – 8:30 a.m. **Welcome, Committee Announcements and Introductions (*Starlight Ballroom*)**

8:30 a.m. – 9:45 a.m. ***Which Law Do I Follow?!* E-Verify, The Duty to Bargain and The Intersection of an Employer's Immigration Law Compliance Obligations and the NLRA**

Management: **Joshua D. Nadreau**
Fisher Phillips

Union: **Monica Guizar**
Weinberg, Roger & Rosenfeld P.C.

9:00 a.m. – 10:30 a.m. ***Spouse/Guest Breakfast* (*Jones Library*)**

9:45 a.m. – 10:00 a.m. **Break (*Starlight Ballroom Foyer*)**

10:00 a.m. – 11:15 a.m. ***Magic Words, The Duty to Bargain, and 10(b):*** **The Board's Re-Evaluation of 9(a) Bargaining Relationships in the Construction Industry, Whether the Parties Have to Bargain in Good Faith When Bargaining an 8(f) Agreement, and When is the 10(b) Limitations Period not the 10(b) Limitations Period**

Management: **Philip A. Miscimarra**
Morgan, Lewis & Bockius LLP

Union: **Richard F. Griffin, Jr.**
Bredhoff & Kaiser PLLC

11:15 a.m. – 12:30 p.m. ***Rules, Rules & More Rules:*** **Memorandum GC 18-04 and Employer Work Rules in the Post-*Boeing Company* World**

Management: **Carita Austin**
Faegre Baker Daniels LLP

Union: **Melinda Hensel**
International Union of Operating Engineers, Local 150

Moderator: **Nicole Mormilo**
National Labor Relations Board

6:00 p.m. – 7:00 p.m. **Speakers and Editors Reception (*invitation only*)**

<u>TUESDAY, FEBRUARY 26</u>

7:00 a.m. – 8:00 a.m. **Breakfast Buffet (*Deck*)**

7:00 a.m. – 8:00 a.m. **Women's Breakfast (*Jones Library*)**

8:00 a.m. – 9:15 a.m. ***Anarchy, Business as Usual, Something in Between? Lucia v. SEC*** **and the Constitutional Challenge to the NLRB's ALJs (*Starlight Ballroom*)**

Management: **Jay M. Dade**
Polsinelli PC

Union: **Benjamin O'Donnell**
Gilbert & Sackman

Moderator: **Genaira Tyce**
National Labor Relations Board

9:15 a.m. – 10:15 a.m. **Enforcement Litigation Review**

Speakers: **Meredith Jason**
Ruth Burdick
National Labor Relations Board
Washington, DC

10:00 a.m. – 10:15 a.m. **Break (*Starlight Foyer*)**

10:15 a.m. – 11:15 a.m. **"C" Case Review**

Speaker: **Jayme Sophir**
Associate General Counsel – Division of Advice
National Labor Relations Board
Washington, DC

11:15 a.m. – 12:30 p.m. ***Whose Burden is it Anyway? East End Bus Lines* and the Nexus Element under *Wright Line***

Management: **Harry I. Johnson III**
Morgan, Lewis & Bockius LLP

Union: **Kate M. Swearengen**
Cohen, Weiss & Simon LLP

12:30 p.m. – 12:45 p.m. **Committee and Section Business**

4:30 p.m. – 6:30 p.m. **Pro Bono Project with The People Concern at *SAMOSHEL***

WEDNESDAY, FEBRUARY 27

7:00 a.m. – 8:00 a.m. **Breakfast Buffet (*Deck*)**

7:00 a.m. – 8:00 a.m. **Diversity and Inclusion Breakfast (*Wilshire 1*)**

8:00 a.m. – 9:15 a.m. ***Reading the Tea Leaves*: The Implications of *Janus v. AFSCME* in the Private Sector (*Starlight Ballroom*)**

Management: **Kyllan Kershaw**
Seyfarth Shaw LLP

Union: **Leon Dayan**
Bredhoff & Kaiser PLLC

9:15 a.m. – 10:30 a.m. **Update from the Office of General Counsel:**
2018 Enforcement Developments and 2019 Planned Initiatives

Speaker: **Hon. Peter B. Robb, General Counsel**

10:30 a.m. – 10:45 a.m. **Break (*Starlight Ballroom Foyer*)**

10:45 a.m. – 11:45 a.m. **"R" Case Review: Discussion of Recent Issues Arising in Bargaining Unit Elections under Section 9 of the Act**

Speaker: **Terence Schoone-Jongen**
National Labor Relations Board
Washington, DC

11:45 a.m. – 1:00 p.m. **A Conversation with the National Labor Relations Board**

Speakers: **Hon. John F. Ring, Chairman**
Hon. Lauren McFerran, Member
Hon. William J. Emanuel, Member
Hon. Marvin E. Kaplan, Member
National Labor Relations Board
Washington, DC

7:00 p.m. – 10:00 p.m. **Farewell Reception and Dinner (*Wedgewood Ballroom*)**

Meeting papers and presentations are posted online at:
www.ambar.org/DLLpapers

We thank the following law firms for their generous support of the 2019 DLL Committee Midwinter Meeting:

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Date: Wednesday, March 20, 2019 12:55:36 PM

Dear Member Kaplan:

Thank you for your willingness to participate in our 8th Annual Employment & Labor Law Conference. It will be held on Tuesday, April 2 at The Wilshire Grand Hotel, 350 Pleasant Valley Way, West Orange, New Jersey 07052. We are very excited and honored to have you. Our portion of the conference, which is entitled "NLRB Update with Former Chairman and Current Member of the NLRB, Marvin E. Kaplan," is scheduled to begin at 12:45 p.m. and last an hour.

Below is a list of questions (broken down by topic) that we would like to ask you during the traditional labor law portion of the conference. Please let us know if you are unable to address any of these questions (or otherwise have any comments or concerns). Additionally, as we may be unable to get to all of these questions in the allotted hour, please feel free to let us know if there are some questions you prefer to address over others so we can prioritize them for you. Either me or my partner, John Romeo, will plan to briefly follow-up on some of your responses to provide employer insights as appropriate.

We are very much looking forward to seeing you on April 2. Thank you.

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Joint-Employer Standard

As one of the NLRB Members who has endorsed utilizing the rulemaking process to examine the joint-employment standard:

1. why is this an important topic to address?

2. why do you think there has been fierce opposition by some?

3. why is rulemaking an appropriate way to address the joint-employer standard?

4. where are we in the rulemaking process?

Independent-Contractor Standard

1. In light of the Board's decision in *FedEx Home* Delivery, 361 NLRB 610 (2014), why was it important for the NLRB to clarify the role entrepreneurial opportunity plays in the independent-contractor determination in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)?

2. How does the clarification change how the Board examines independent-contractor status?

Workplace Rules

1. Why was the standard for evaluating workplace rules as set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) problematic and how did the decision in *The Boeing Co.*, 365 NLRB No. 154 (2017) alleviate those problems?

2. Are you able to provide any insight as to where social media policies fall in the *Boeing* rubric?

3. In Memorandum GC 18-02, citing to *Banner Estrella Med. Ctr.*, 362 NLRB No. 190 (2015), General Counsel Peter Robb suggested that he may ask the NLRB to use an alternative analysis when examining the legality of workplace rules that require employees to maintain the confidentiality of workplace investigations. Are you able to provide any insight as to where such rules fall in the *Boeing* rubric?

4. What issues is the Board examining in *Caesars Entm't Corp. d/b/a Rio All-Suites Hotel & Casino*, Case No. 28-CA-060841?

5. In *Constellation Brands, U.S. Operations, Inc.*, 367 NLRB No. 79 (2019), the NLRB found a statement in an employer's handbook about its incentive bonus plan, which read, "All non-union full time and regular part-time employees of the Company are eligible for the incentive plan" to be unlawful. Can you explain why the Board found that statement to be unlawful?

6. Footnote four of the *TBC Corp.*, 367 NLRB No. 18 (2018) decision reads, "Chairman Ring and Member Kaplan express no opinion with respect to whether the *Passavant* requirements represent a proper standard for effective repudiation of unlawful conduct, but they agree that the Respondents' actions met the *Passavant* standard in this case." Why did you feel it was important to note that?

Protected Concerted Activity

1. In *Alstate Maint., LLC*, 367 NLRB No. 68 (2019), why was it important for the NLRB to overrule the decision in *WorldMark by Wyndham*, 356 NLRB 765 (2011)?

2. In assessing whether an employee's conduct is protected concerted activity, why is an overly technical focus on the use of pronouns like "us" and "we" incompatible with the National Labor Relations Act?

Election Standards and Rules

1. Why was the Board's decision in *Specialty Healthcare & Rehabilitation Ctr. of Mobile*, 357 NLRB 934 (2011) flawed?

2. In response to the request for information regarding the election regulations, what comments has the NLRB received for and against the quickie election rule?

3. What is the status of the request for information regarding the election regulations?

Non-Union Member Dues for Political Activities

Can you explain what it means to be a "*Beck* objector" and why it was important for the Board to protect the rights of employees in *United Nurses & Allied Professional (Kent Hosp.)*, 367 NLRB No. 94 (2019)?

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To: Kaplan, Marvin E.
Cc: (b) (6)
Subject: Fwd: 8th Annual Gibbons Employment & Labor Law Conference
Date: Friday, March 29, 2019 9:39:29 AM

Member Kaplan:

Following-up on your correspondence with (b) (6), please see message below regarding next week's conference. Thank you.

Sent from my iPhone

Begin forwarded message:

From: (b) (6) @gibbonslaw.com>
Date: March 20, 2019 at 12:55:22 PM EDT
To: "marvin.kaplan@nlrb.gov" <marvin.kaplan@nlrb.gov>
Cc: (b) (6) @gibbonslaw.com>, (b) (6) (b) (6) @gibbonslaw.com>
Subject: 8th Annual Gibbons Employment & Labor Law Conference

Dear Member Kaplan:

Thank you for your willingness to participate in our 8th Annual Employment & Labor Law Conference. It will be held on Tuesday, April 2 at The Wilshire Grand Hotel, 350 Pleasant Valley Way, West Orange, New Jersey 07052. We are very excited and honored to have you. Our portion of the conference, which is entitled "NLRB Update with Former Chairman and Current Member of the NLRB, Marvin E. Kaplan," is scheduled to begin at 12:45 p.m. and last an hour.

Below is a list of questions (broken down by topic) that we would like to ask you during the traditional labor law portion of the conference. Please let us know if you are unable to address any of these questions (or otherwise have any comments or concerns). Additionally, as we may be unable to get to all of these questions in the allotted hour, please feel free to let us know if there are some questions you prefer to address over others so we can prioritize them for you. Either me or my partner, (b) (6) (b) (6) will plan to briefly follow-up on some of your responses to provide employer insights as appropriate.

We are very much looking forward to seeing you on April 2. Thank you.

(b) (6)

(b) (6)
GIBBONS P.C.

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Joint-Employer Standard

As one of the NLRB Members who has endorsed utilizing the rulemaking process to examine the joint-employment standard:

1. why is this an important topic to address?

2. why do you think there has been fierce opposition by some?

3. why is rulemaking an appropriate way to address the joint-employer standard?

4. where are we in the rulemaking process?

Independent-Contractor Standard

1. In light of the Board's decision in *FedEx Home* Delivery, 361 NLRB 610 (2014), why was it important for the NLRB to clarify the role entrepreneurial opportunity plays in the independent-contractor determination in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)?

2. How does the clarification change how the Board examines independent-contractor status?

Workplace Rules

1. Why was the standard for evaluating workplace rules as set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) problematic and how did the decision in *The Boeing Co.*, 365 NLRB No. 154 (2017) alleviate those problems?

2. Are you able to provide any insight as to where social media policies fall in the *Boeing* rubric?

3. In Memorandum GC 18-02, citing to *Banner Estrella Med. Ctr.*, 362 NLRB No. 190 (2015), General Counsel Peter Robb suggested that he may ask the NLRB to use

an alternative analysis when examining the legality of workplace rules that require employees to maintain the confidentiality of workplace investigations. Are you able to provide any insight as to where such rules fall in the *Boeing* rubric?

<!--[if !supportLists]-->4. <!--[endif]-->What issues is the Board examining in *Caesars Entm't Corp. d/b/a Rio All-Suites Hotel & Casino*, Case No. 28-CA-060841?

<!--[if !supportLists]-->5. <!--[endif]-->In *Constellation Brands, U.S. Operations, Inc.*, 367 NLRB No. 79 (2019), the NLRB found a statement in an employer's handbook about its incentive bonus plan, which read, "All non-union full time and regular part-time employees of the Company are eligible for the incentive plan" to be unlawful. Can you explain why the Board found that statement to be unlawful?

<!--[if !supportLists]-->6. <!--[endif]-->Footnote four of the *TBC Corp.*, 367 NLRB No. 18 (2018) decision reads, "Chairman Ring and Member Kaplan express no opinion with respect to whether the *Passavant* requirements represent a proper standard for effective repudiation of unlawful conduct, but they agree that the Respondents' actions met the *Passavant* standard in this case." Why did you feel it was important to note that?

<u>Protected Concerted Activity</u>

<!--[if !supportLists]-->1. <!--[endif]-->In *Alstate Maint., LLC*, 367 NLRB No. 68 (2019), why was it important for the NLRB to overrule the decision in *WorldMark by Wyndham*, 356 NLRB 765 (2011)?

<!--[if !supportLists]-->2. <!--[endif]-->In assessing whether an employee's conduct is protected concerted activity, why is an overly technical focus on the use of pronouns like "us" and "we" incompatible with the National Labor Relations Act?

<u>Election Standards and Rules</u>

<!--[if !supportLists]-->1. <!--[endif]-->Why was the Board's decision in *Specialty Healthcare & Rehabilitation Ctr. of Mobile*, 357 NLRB 934 (2011) flawed?

<!--[if !supportLists]-->2. <!--[endif]-->In response to the request for information regarding the election regulations, what comments has the NLRB received for and against the quickie election rule?

<!--[if !supportLists]-->3. <!--[endif]-->What is the status of the request for

information regarding the election regulations?

Non-Union Member Dues for Political Activities

Can you explain what it means to be a "*Beck* objector" and why it was important for the Board to protect the rights of employees in *United Nurses & Allied Professional (Kent Hosp.)*, 367 NLRB No. 94 (2019)?

From: (b) (6)
Subject: 2019 HR Association Spring Labor and Employment Conference
Date: Friday, April 12, 2019 2:56:31 PM

Good Afternoon,

I am writing to confirm that you will be available to speak at the HR Policy Association Spring Labor and Employment Conference on Tuesday, May 14th from 12:45 p.m. – 2:00 p.m. at the Jones Day offices located at 300 New Jersey Ave NW, Washington D.C. 20001. The Association would like you to participate on a panel entitled "Developments from the National Labor Relations Board" and cover various initiatives that the Board has undertaken involving joint employer rulemaking, election rule review, employer obligations regarding access to their email systems, and independent contractor case law developments that would be of interest to our members.

I hope that you can join us for our Spring Labor and Employment Conference. Please contact me if you have any questions.

Thank you,

(b) (6)
HR Policy Association
1100 13th St, NW, Suite 850 | Washington, DC 20005
Direct: (b) (6) | Cell: (b) (6) (b) (6)@hrpolicy.org
Assistant: (b) (6) @hrpolicy.org

From: (b) (6)
To: Kaplan, Marvin E.
Cc: (b) (6)
Subject: Re: HR Policy Association Spring Labor and Employment Conference - Tuesday, May 14th
Date: Tuesday, May 14, 2019 11:50:01 AM

Anytime after Noon for lunch - we are on 12:45 pm - see you shortly

Sent from my iPhone

On May 14, 2019, at 9:07 AM, Kaplan, Marvin E. <Marvin.Kaplan@nlrb.gov> wrote:

> What time would you like me there?
>
> Get Outlook for iOS
>
> ---
>
> **From:** (b) (6) @hrpolicy.org> on behalf of (b) (6) (b) (6) @hrpolicy.org>
> **Sent:** Wednesday, May 8, 2019 3:51:32 PM
> **To:** Kaplan, Marvin E.
> **Cc:** (b) (6)
> **Subject:** HR Policy Association Spring Labor and Employment Conference - Tuesday, May 14th
>
> Marvin,
>
> It was good to talk to you the other day. Pursuant to our conversation, we agreed that your presentation will be informal in nature with both of us sitting at a table, me asking you about certain issues that we believe will be of interest to our members, and you responding with your thoughts as to the status of such matters and the development of the law in these areas. Specifically, we identified the following topics for our conversation: (1) the status of the Board's joint employer rulemaking and other developments in the joint employer area under the National Labor Relations Act, (2) the status of the Board's review of its election rules and potential changes to such rules, (3) The recent refinement of the law in the successorship area including particularly the definition of "perfectly clear" successor, (4) the development and refinement of the protected concerted activity doctrine including recent case law developments regarding same, (5) the Board's refinement of the definition of independent contractor status under the NLRA, and (6) the Board's approach to the *Banner Health Systems* case with respect to confidentiality of workplace investigations.
>
> Time permitting, we also perhaps can cover the *Purple Communications* issues relating to employee access to employer email systems.
>
> Marvin, thank you again for taking time out of your busy schedule to join us on Tuesday, May 14th at the Jones Day D.C. offices. Please call me If you have any

questions regarding the Conference.

Thank you,

(b) (6)
HR Policy Association
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From: (b) (6)
Subject: FYI
Date: Wednesday, July 24, 2019 3:21:59 PM
Attachments: GRK Testimony.pdf

See attached.

(b) (6)
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COALITION FOR A
DEMOCRATIC WORKPLACE

Testimony of

G. Roger King*
Senior Labor and Employment Counsel
HR POLICY ASSOCIATION
on behalf of the COALITION FOR A DEMOCRATIC WORKPLACE

For the

House Education and Labor Committee
Subcommittee on Health, Employment, Labor, and Pensions

Hearing on

Protecting the Right to Organize Act: Modernizing America's Labor Laws

July 25, 2019

*Mr. King acknowledges the assistance of his colleague Gregory Hoff at the HR Policy Association in preparing this testimony.

Introduction and Statement of Interest

Chairperson Wilson, Ranking Member Walberg, and distinguished members of the Subcommittee:

Thank you for this opportunity to again appear before the Committee. I am the Senior Labor and Employment Counsel at HR Policy Association, and I am testifying here today on behalf of the Coalition for a Democratic Workplace ("CDW"), a broad-based coalition of employers and associations who have a continuing active interest in our nation's labor laws, and of which HR Policy Association is a member. My biographical information is attached to my written testimony. I request that my written testimony and the exhibits thereto, in their entirety, be entered into the record of this hearing.

The Coalition for a Democratic Workplace is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with a long- standing effort by some in the labor movement to make radical changes to the National Labor Relations Act without regard to the severely negative impact they would have on employees, employers and the economy. CDW was originally formed in 2005 in opposition to the so-called Employee Free Choice Act (EFCA) – a bill similar to the PRO Act – that would have stripped employees of the right to secret ballots in union representation elections and allowed arbitrators to set contract terms regardless of the consequence to workers or businesses.

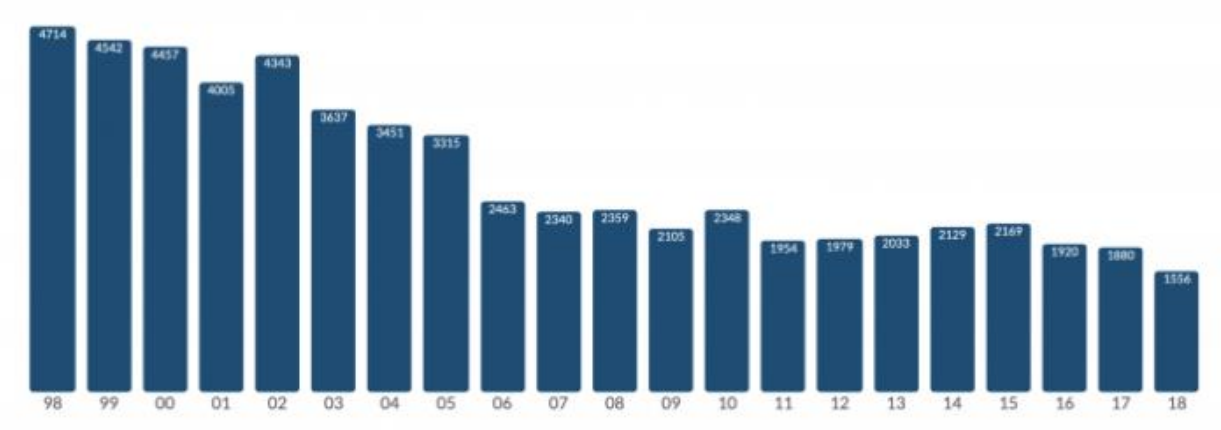
The HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. Recently, the HR Policy Association published *Workplace 2020: Making the Workplace Work*, a report representing the general views and experiences of the Association's membership on the trends shaping the workforce, the outdated policies that govern it, and the way forward.

Summary of Opposition to H.R. 2474

The Protecting the Right to Organize Act of 2019, H.R. 2474 is an unprecedented attempt to radically change our nation's labor laws to assist labor organizations without any regard to any negative impact the provisions of the bill would have on workers, consumers, employers, and the American economy. Such provisions include (1) amendments to the National Labor Relations Act ("NLRA" or "the Act") to change the definition of joint employer status under the NLRA – a position directly opposite the bipartisan position the House of Representatives took in passing the Save Local Business Act, passed in November of 2017; (2) an expansive definition of employee status under the NLRA that blindly follows a controversial California court decision which substantially narrowed the definition of independent contractor status (the California "ABC" test); (3) authorization for unions to obtain personal employee information including employee personal cell phone numbers and personal email addresses, among other information; (4) a complete undermining of the secondary boycott laws that protect neutral employers and employees – especially small and medium-sized business entities – from being brought into labor disputes of

other parties; (5) a government-mandated procedure for third party arbitrators to dictate employment terms in first negotiations, and eliminate an opportunity for employees to vote on ratification; and (6) a resurrection of the "card check" process whereby employees can be forced into union representation without having the benefit of a secret ballot vote. H.R. 2474 would also overrule three Supreme Court decisions,[1] and make extreme changes to the procedures of the National Labor Relations Board ("NLRB" or "Board"). H.R. 2474 upsets in many important areas the delicate balance in our labor laws between employers and labor interests – indeed, many of the laws amended by this legislative proposal have been in effect for decades, including numerous state right-to-work laws, and have not been altered in the manner suggested in this legislation by either Democrat or Republican controlled congresses.

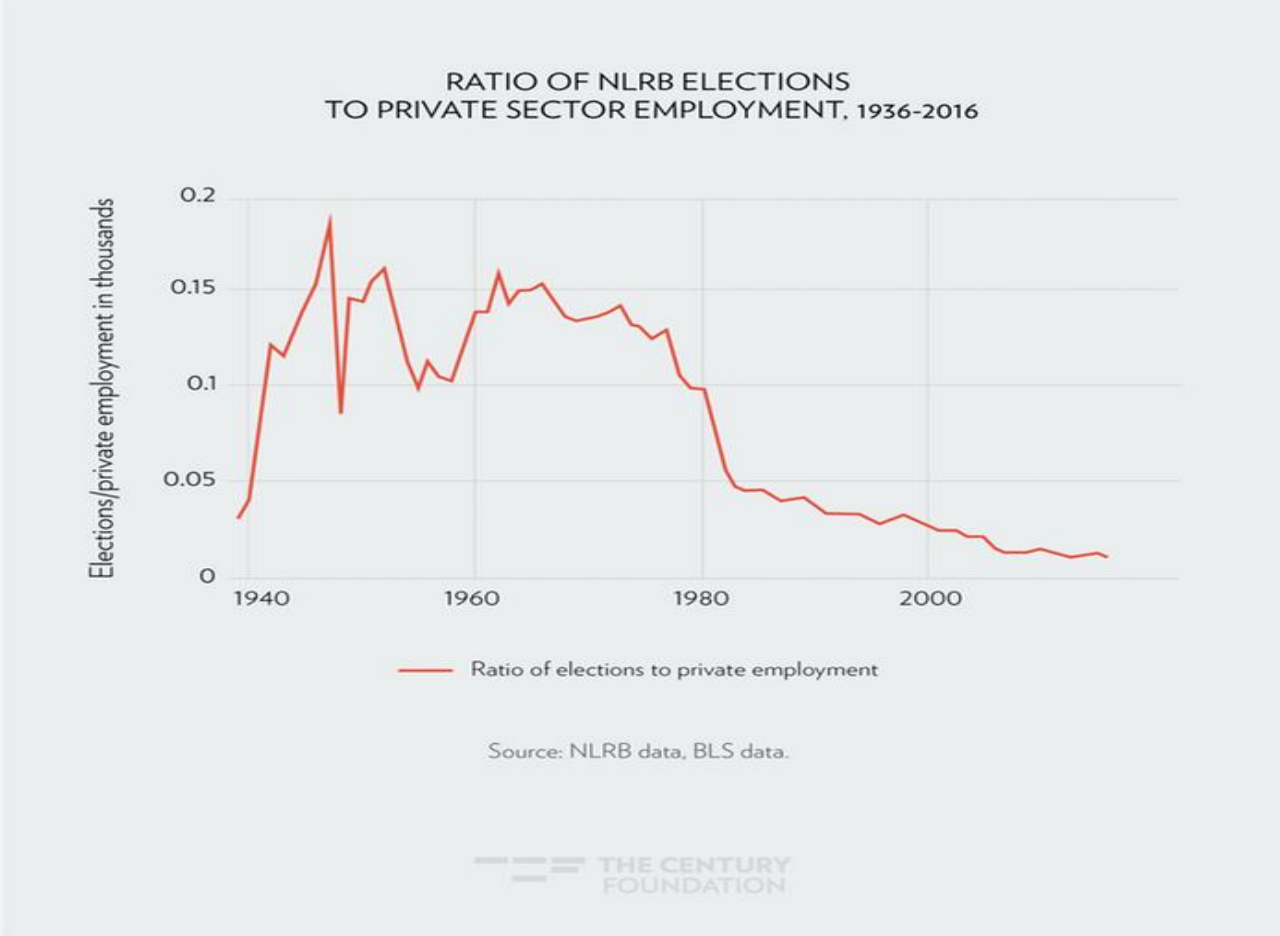
Finally, the underlying premise of this comprehensive labor organization wish list is the incorrect assumption that our labor laws are broken and severely disadvantage union interests. The NLRB and the NLRA are not broken – the Board is one of the most efficient and productive agencies in the federal government and the NLRA has greatly contributed to the maintenance of labor-management stability in this country for decades. Labor organizations have simply not devoted the necessary resources to organizing activity and have not adapted to a changing workplace. As the charts below clearly show, union organizing and the number of petitions filed by unions with the National Labor Relations Board have fallen nearly 63% from 5,000 in 1997 to 1,854 in 2017.



Source: Labor Relations Institute

In FY 2018, the number of petitions filed dropped even further to 1,597, the fewest number in over 75 years.[2] Perhaps most telling, as the rate of private sector employment has increased, the number of NLRB elections has decreased precipitously.

[1] *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018); *Hoffman Plastic Compounds, Inc., v. NRLB*, 533 U.S. 137 (2002); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).
[2] *See also* Exhibit 1, which shows similar data from the National Labor Relations Board.



Further, when examining data from the U.S. Department of Labor Bureau of Labor Statistics, the lack of union attention to union organizing is even more evident. In FY 2018, there were 95.8 million potential private sector employees available for organizing in the country under the National Labor Relations Act.[3] The number of employees petitioned-for, in that same year, according to NLRB statistics, was only 73,109.[4] Accordingly, unions only sought to represent .076% of potential new members in this country. An examination of data from other years also establishes the same exceedingly low union organizing rate.

This lack of attention by the union movement to traditional organizing also was recently outlined in an article entitled "AFL-CIO Budget is a Stark Illustration of the Decline of Organizing"[5] According to this article, the AFL-CIO's internal budget for 2018-2019 dedicates less than one-tenth of its budget to organizing – down from nearly 30% a decade ago. This article states "the percentage of the budget dedicated to all organizing activities is about the same as the

[3] *Union Membership Annual News Release*, BUREAU OF LABOR STATISTICS (Jan. 18, 2019), https://www.bls.gov/news.release/archives/union2_01182019.htm.
[4] *Election Reports – FY 2018*, NLRB, https://www nlrb.gov/reports/nlrb-performance-reports/election-reports/election-reports-fy-2018.
[5] Hamilton Nolan, *AFL-CIO Budget is a Stark Illustration of the Decline of Organizing*, SPLINTER (May 16, 2019), https://splinternews.com/afl-cio-budget-is-a-stark-illustration-of-the-decline-o-1834793722.

portion dedicated to funding the Offices of the President, Secretary-Treasurer, Executive Vice President, and associated committees [under the AFL-CIO] the largest portion of the budget – more than 35% – is dedicated to funding political activities." The statistics are clear. Unions have, for whatever reason, lost their desire and commitment to organize workers and they are increasingly relying on Congress to relieve them of the burdens of organizing with proposals such as the PRO Act that we are discussing today. Further, the labor movement is increasingly relying upon assistance from pro-union regulations promulgated by the regulatory agencies and decisions of the NLRB.[6]

Labor law leaders themselves have acknowledged the failure of the union movement to commit sufficient resources and attention to organizing. For example, the late Hector Figueroa, the influential former leader of SEIU Local 32BJ, in an op-ed published in the New York Times earlier this month, argued that "you will find that with only a few exceptions, most unions are not committing significant resources to organizing nonunion workers."[7] Figueroa further noted:

> For too long, too many unions have avoided the tough work that needs to be done to organize nonunion workers, to convince our own members that it's in their interest to expand our ranks, and to retool our organizations by putting resources into building power. We have let ourselves be backed into a corner, by trying to just hold on to what we have and fighting only for workers who are already union members."[8]

Labor advocates have further taken union leadership to task for failing to adapt and incorporate new technologies and social media opportunities into their organizing efforts. In particular, Mark Zuckerman, former Deputy Director of the Domestic Policy Council in the Obama White House and President of the Century Foundation, observed:

> It is surprising that one of the most successful and powerful social movements in the nation's history – the labor movement – has not launched a coherent, large-scale digital organizing strategy to recruit a new generation of workers.[9]

---

[6]Notwithstanding the Obama Board's substantial change in labor policy in favor of unions, and the Obama Board's adoption of expedited or ambush election rules, union density still has declined. *See*, *e.g.*, Michael J. Lotito et al., *Was the Obama NLRB the Most Partisan Board in History?*, WORKPLACE POL'Y INST. (Dec. 6, 2016), https://www.littler.com/publication-press/press/was-obama-nlrb-most-partisan-board-history (noting that the Obama Board overturned nearly 4,600 years of established law).

[7] Hector Figueroa, "The Labor Movement Can Rise Again" N.Y. TIMES (Jul. 12, 2019), https://www.nytimes.com/2019/07/12/opinion/hector-figueroa.html.

[8] *Id*.

[9] Mark Zuckerman, *Finding Workers Where They Are: A New Business Model to Rebuild the Labor Movement*, THE CENTURY FOUNDATION (Feb. 6, 2019), https://tcf.org/content/report/finding-workers-new-business-model-rebuild-labor-movement/?agreed=1. *See also,* "Unions aren't exactly early adopters, and many still haven't embraced digital" Jack Milroy, *Why Unions Need a Digital Strategy*, MEDIUM (Apr. 29, 2016), https://medium.com/@jack_milroy/the-list-makes-us-strong-why-unions-need-a-digital-strategy-42291213298a; "It is heartbreaking to witness our movement risk near-irrelevance when workers are ready to take action" Figueroa, supra note 5.

Congress should not be misled regarding the reasons for the decline in union membership. Further, Congress should not respond to requests to continually rescue the labor movement from its own shortcomings. H.R. 2474, unfortunately, is a prime example of exactly this type of rescue attempt. H.R. 2474 is an unprecedented attempt to radically change our nation's labor laws in a manner harmful not only to employers and employees but also ultimately to the nation's economy. CDW, and its hundreds of members, including the HR Policy Association, strongly oppose its enactment.[10]

Specific Objections to H.R. 2474

- **Section 2 – The Policy Statements**

This Section of the PRO Act is largely political policy rhetoric and contains inaccurate statements in a number of areas, including the statement on page 4 that "employers routinely fire workers for trying to form a union at their workplace" and the statement at page 4 that "many employers maintain policies that restrict the ability of workers to discuss workplace issues with each other directly contravening [NLRA]… rights." These activities are unlawful, and the Board provides mechanisms for addressing these problems. Statements at page 6 of the bill are also incorrect that state that Congress disapproves of the right of employers to permanently replace economic strikers; and that "…employers have abused the representation process of the NLRB to impede workers from freely choosing their own representatives and exercising their rights under the Act."

- **Section 4 – Establishment of a New Joint Employer Standard**

This Section of H.R. 2474 adopts the widely criticized standard established in *Browning-Ferris Indus.*, 362 NLRB No. 186 (2015) to determine joint employer status under the NLRA.[11] Indeed, this provision is directly opposite of the bipartisan position the House of Representation took on this issue in a floor vote on the Save Local Business Act in November of 2017. Further, this provision of the legislation arguably goes even beyond the holding in the *Browning-Ferris* case, by stating that joint employer status can be established under the NLRA based solely on "indirect or reserved control." This proposal inappropriately expands the definition of joint employer status, which would result in unnecessary protracted litigation and potential liability for many business entities. This legislative proposal has the potential to destroy the franchisor and franchisee model that has led to the creation of millions of jobs in this country and the development of hundreds of thousands of successful small business entities.[12] CDW does, however, support the initiatives

[10] CDW fully endorses the previous opposition testimony presented by attorney Philip Miscimarra of the Morgan Lewis law firm, who also previously served as both a member and chairman of the National Labor Relations Board.
[11] *Browning-Ferris Indus.*, 352 NLRB No. 186 (2015)
[12] For a comprehensive analysis detailing the negative economic consequences of an overly expansive joint employer standard, *see* International Franchise Association, Comment Letter on Proposed Rule on the Standard for Determining Joint Employer Status (Jan. 28, 2019); *see also* Brief of Amicus Curiae The International Franchise Association in Support of Defendant, *Roman et al. v. Jan-Pro Franchising Int'l, Inc.*, No. 3:16-cv-05961 (9th Cir. 2019).

currently being undertaken by the NLRB to better define when a joint employer status is established under the NLRA. CDW also supports the notice of proposed rulemaking initiative being undertaken by the United States Department of Labor to clarify when joint employer status is established under the Fair Labor Standards Act.

- **Section 4 – Definition of Employee Status**

This Section of the legislation essentially adopts the "ABC" test developed by the California Supreme Court.[13] If adopted, it would invalidate decades of legal precedent regarding the definition of independent contractor status and make it far more difficult for workers to establish independent status, evidenced by California's struggle to codify the standard into law without creating multiple carve outs. The fact that an individual performs a service for a business that is within the scope of the services customarily provided by such entity should not – and has not – automatically make such an individual an employee of the entity in question. This proposal clearly is directed at the evolving nature of the type of work that many individuals do on an independent basis in the evolving "gig" economy, and would have a devastating impact on such workers. The issue of when an individual is an employee or an independent contractor should be addressed in separate legislation, and then only after a thorough study of the many complex issues associated with this area. The blind approach taken in H.R. 2474 to this issue should be clearly rejected.

- **Section 4 – Alteration of the Definition of a Supervisor Under the NLRA**

While CDW agrees that it would be helpful to clarify the definition of supervisory status under the NLRA, the approach being taken in H.R. 2474 is clearly a one-sided and biased approach to make more individuals employees under the Act and therefore, become eligible for union representation. There is no factual or legal basis to support the proposed amendments to Section 2(11) of the NLRA contained in this bill. It is critical that employers have the ability to rely upon the requisite number of supervisors and managers to run their business. Finally, this proposal would unnecessarily, and improperly overrule decades of NLRB case law established under both Democrat and Republican Boards regarding the definition of supervisory status under the NLRA.

- **Section 4 – Establish Authority for the National Labor Relations Act to Engage in Economic Analysis**

While credible arguments can be made that the NLRB should be provided with the authority to engage in certain economic analysis, particularly in the rulemaking area, more study and thought should be given to when and how the Board should engage in this type of analysis. The simple one-line provision in H.R. 2474 that would provide authority for the Board to engage in economic analysis is not the correct way to proceed on this issue.

[13] *Dynamex Operations W. v. Superior Court*, 232 Cal.Rptr.3d 1 (2018).

- **Section 4 – Prohibition on Employer Hiring Permanent Replacements in Economic Strike Situations**

The PRO Act, as stated above, erroneously stated in its preamble that Congress has previously concluded that employers are prohibited from hiring permanent replacements in economic strike situations. This provision of H.R. 2474 is yet another example of the one-sided and incorrect approach taken in this legislation. The case law, including U.S. Supreme Court decisions, clearly permits employers to continue their operations during economic strikes by hiring replacement workers.[14] The right of unions to strike and the right of employers to hire permanent replacements is an important balance of interests under our Nation's labor laws and permits both unions and employers to engage in "economic warfare" if disputes cannot otherwise be resolved. While the CDW believes that the option for employers to use permanent replacements should only be carefully and thoughtfully utilized, such right nonetheless needs to be maintained as it is critical to achieve the necessary balance of interests when strikes occur.

- **Section 4 – Employer Presentations to Employees**

H.R. 2474 makes it an unfair labor practice for an employer to hold mandatory employee meetings in the workplace in union campaign settings ("i.e., so-called captive audience speeches"). To our knowledge, there is no evidence to support the conclusion that employers can unduly influence employees to oppose unionization in such meetings. Further, an employer is considerably restricted in what it can say in such meetings. For example, election objections can be successfully pursued by a union or unfair labor practices charges could be successfully filed against an employer if, in such meetings, the employer threatens employees who support unionization, or the employer promises better benefits to employees if they oppose unionization. Further, the faulty premise that such meetings seriously impede a union's ability to win an election is specious at best, particularly due to the ability of employees to communicate through social media with unions and also among themselves using a wide array of options. Indeed, an employee's ability today to go online to obtain facts and information about the issues of union representation is greater than ever. In summary, these meetings have virtually no bearing on the success or lack thereof of the union movement and should not be made unlawful. Finally, it needs to be noted that unions, unlike employers, have the right to visit employees at their homes and engage in campaign activity in such settings.

- **Section 4 – Government Controlled Collective Bargaining – Arbitrator Imposed Terms (Interest Arbitration) in Initial Bargaining Situations**

H.R. 2474 establishes for the first time in the NLRA, government control of collective bargaining. In negotiations, the legislation establishes minimum time frames for parties to negotiate. If an agreement cannot be reached within such timeframe, panels of arbitrators are mandated to impose employment terms on the parties. This is an exceedingly poor policy decision

[14] *Hoffman Plastic Compounds, Inc., v. NRLB*, 533 U.S. 137 (2002).

by the drafters of the PRO Act. Third party arbitrators may know virtually nothing about the employer's business and have no economic interest or stake in the future of the business entity in question. The ultimate terms that such arbitrators impose upon the parties may lead to the closure of the business entity and the loss of jobs of its employees.

- **Section 4 – Restriction on Employer Prohibitions on Employee Class or Collective Action Filings**

This provision would invalidate the U.S. Supreme Court's decision in *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018), which held that employers can place restrictions on employees' class or collective action filings.[15] The approach of this legislation ignores the sound reasoning of the Supreme Court's majority in *Epic Systems* and also undermines substantial legal precedent regarding the Federal Arbitration Act that encourages nonjudicial resolution of workplace disputes. Class and collective action litigation have literally "spun out of control" in the last decade, and legitimate attempts by employers to resolve workplace disputes through alternative procedures other than protracted, expensive class and collective action litigation should be encouraged by the Committee, not discouraged.

- **Section 4 – NLRB Election Rules – Requirement that Employees Furnish Personal, Private Information to Petitioning Unions**

This subsection of H.R. 2474 is a substantial invasion of the privacy rights of employees. The legislation would require employers to provide to petitioning unions their employees' "personal landline and mobile telephone numbers and work and personal email addresses," along with other information, if the employee is in a voting unit being proposed by the petitioning union. The legislation does not permit the employee to opt-out of providing this personal information and provides absolutely no protection that such personal information would be kept confidential and not shared with others.

- **Section 4 – Prohibition on Employer Party Status in NLRB Representation Proceedings**

This subsection is a substantial violation of employer due process rights as employers have compelling interests to protect in such proceedings, including the important interest as to which job classifications are to be included in a voting unit. Further, employers have critical interests in which employees are to be classified as supervisors, managers, and confidential employees as such individuals are vitally important for an employer to successfully operate its business. Finally, employers have substantial interests in the procedure to be utilized in any NLRB conducted election as employers must necessarily protect against inappropriate interference with their operations during an NLRB election. There is no evidence to support the need to prohibit an employer from being a party to an NLRB election proceeding. To completely eviscerate an

[15] *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018).

employer's party status in representation election proceedings is not only a violation of employer's due process rights, but will result in a completely unworkable NLRB election procedure.

- **Section 4 – Imposition of Bargaining Orders Through Card Checks**

This subsection of the legislation brings back "card checks" and memories of the failed Employee Free Choice Act that was strongly supported by organized labor. Under the new iteration, virtually any type of proven irregularities in an NLRB election that a union loses would result in a bargaining order if, in the year proceeding the election, the petitioning union had obtained signatures on authorization cards for a majority of the employees in the voting unit. There is no compelling evidence whatsoever to support such a radical change in federal labor law. Indeed, this approach is simply a "backdoor card check" approach to determine union representational status. *Gissel* bargaining orders[16] are available today to unions if they can establish that employers have committed numerous and severe unfair labor practices or objectionable conduct during the critical pre-election period. Finally, a very small percentage of unfair labor practice cases ever reach the Board or courts for decision. In FY 2018, nearly 80% of unfair labor practice charges were either resolved by way of settlement, at the regional board level, or at the administrative law judge stage, or withdrawn, with Board Orders comprising only 2% of the disposition of such charges.[17] Stated alternatively, representatives of organized labor have continually, incorrectly overstated both the number of cases where severe election misconduct occurs and misrepresented the type of alleged employer conduct that is at issue in such cases.

- **Section 4 – NLRB Election Rules and Timelines**

The PRO Act codifies certain Obama NLRB era election timelines (also known as "ambush" or "quickie" election regulations). These timelines were very controversial at the time they were adopted and are being reviewed by the Board at present. Any change in Board election procedures should be done by examining all aspects of the election process.

- **Section 4 – Making Decisions of the NLRB Self-enforcing**

The PRO Act changes the current procedure of how Board decisions are enforced by making such decisions effective upon their issuance. The current procedure is that the Board must seek enforcement of its orders in the courts. If the procedure in this area is going to change, other NLRA procedural changes also should be addressed, including a change that would permit employers to directly appeal NLRB decisions in representation cases to the courts without having to first go through the internal Board process of being charged with a technical Section 8(a)(5) violation of failure to bargain in good faith. This current elongated prerequisite for employers to appeal representation decisions is not an appropriate use of resources for any party, including the Board and unions, and results in unnecessary delays in resolving the issues in question.

[16] *See NLRB v. Gissel Packing Co.*, 89 S.Ct. 1918 (1969).
[17] *Disposition of Unfair Labor Practice Charges in FY18*, NLRB, https://www nlrb.gov/news-outreach/graphs-data/charges-and-complaints/disposition-unfair-labor-practice-charges.

- **Section 4 – Establishment of NLRB Civil Fine Remedies and Increased NLRB Injunction Authority**

H.R. 2474 contains numerous subsections that establish civil fines for employer violations of the NLRA and permits NLRB representatives to obtain expedited injunctive relief in federal district courts. There are numerous problems with this approach. First, in the 84-year history of the NLRA and its predecessor, there has never been a procedure that imposed fines and penalties on parties to Board proceedings. If the NLRA is to be restructured in this way, rogue unions that violate the NLRA should also be subject to the same type of civil fines and injunctive procedures. The PRO Act, in its one-sided approach, ignores union misconduct altogether and excludes labor organizations from any type of civil fines and expedited injunctive relief. More fundamentally, this legislative approach is based on the false premise that there are a large number of NLRA violations that merit this type of remedy. As noted above, very few unfair labor practice cases ever reach the Board level and the courts for resolution. Of the cases that do require full NLRB and judicial attention, a very small number involve serious and repeated alleged violations of the Act. Cases that do reach the Board and court level often involve policy issues and close call factual situations as to whether the NLRA has been violated. Civil fines simply are not necessary as a remedy to such a small percentage of cases. In any event, if civil fines are to be included in the NLRA, both rogue employer and rogue unions should be equally subject to such sanctions.

- **Section 4 – Directors and Officers Liability for NLRA Violations**

This subsection of H.R. 2474 extends potential civil penalties to directors and officers of an employer "based on the particular facts and circumstance presented" and "civil liability could be …assessed against any director or officer of the employer who directed or committed the violation, had established a policy that led to such violation, or had actual or constructive knowledge of and the authority to prevent the violation and failed to prevent the violation." Again, our nation's labor laws have never been written as civil penalties statutes, and there is no basis to begin to proceed in that direction at present, particularly when there are exceedingly few instances to compel such a remedy. Additionally, there is great ambiguity on how and when such liability might be assessed. Civil fines in this area and other areas discussed above are also a particular concern given the ever-increasing "policy oscillation" by Boards under different administrations. Stated alternatively, given the frequently changing direction of the Board in important labor policy areas, it would be exceedingly unfair to employer officers and directors to be assessed liability based on unknown changes in the law. Finally, even if the NLRA were to be so amended, as noted above, union officers and officials also should be included in such civil liability.

- **Section 4 – Assessment of Attorneys' Fees and Punitive Damages**

This legislation would also provide for the potential recovery by employees and unions of their attorneys fees and provide for the potential of punitive damages for violation of the NLRA. Again, the legislation does not provide that unions who also violate the NLRA would have any such legal exposure. In any event, for reasons stated above, these non-traditional remedies are not appropriate

to be included in the NLRA, and there has been no case made that the NLRA should be amended to include them.

- **Section 4 – Approval of Intermittent Work Stoppage**

H.R. 2474 would permit unions and employees acting in concert to engage in frequent work stoppages and strikes. This unprecedented permission to engage in protected activity presumably would also include worker slowdowns, "work to rule" employee actions, frequent filing of 10-day strike notices directed against healthcare employers under Section 8(g) of the NLRA, and other union tactics intended to disrupt an employer's operations. There is no objective rationale to support this radical change of our labor laws. Indeed, this provision is especially harmful to employers when it is coupled with an earlier proposal in the PRO Act to prohibit employers from permanently replacing economic strikers.

- **Section 4 – Fair Share Agreements Permitted**

This provision of the PRO Act would invalidate state right-to-work laws and permit unions to negotiate agreements with employers that require bargaining unit employees to either become a member of the union or make a financial contribution to the union for representation expenses (i.e., become a "fee payer") as a condition of continued employment. This subsection would overturn 26 state laws that currently prohibit such clauses in collective bargaining agreements. This part of the NLRA should not be changed. States should continue to determine their position on this issue without interference from the federal government.

- **Section 4 – Right of an Employee to File a Private Right of Action in Federal District Court for Alleged Violations of the NLRA**

The PRO Act for the first time in the history of the NLRA would provide employees with a private right of action to pursue claims of unfair labor practices in federal district court if the NLRB failed to proceed with the individual's charge within 60 days. While the CDW agrees that the NLRB should expeditiously process cases at the Board level, the solution to this issue is not the creation of a new private right of action. This approach will likely flood already overworked federal district courts and unnecessarily clog their dockets. Although there may be a certain appeal to creating a "labor court" system in the country, our federal district courts at present do not have expertise in this area of the law. Additionally, having a dual track for employees to pursue a private right of action while concurrently having the NLRB proceed in addressing the same case could unnecessarily complicate the resolution of unfair labor practice charges. Again, as stated a number of times previously, the Board has an excellent track record in expeditiously resolving a high percentage of its cases at the regional and administrative law judge level, and there is no need, therefore, for a private right of action. Finally, the NLRB at present is reviewing how it processes cases at the Board level and is exploring procedures to expedite its decisional cases processing. The Board should be permitted to complete its important work in this area without legislative interference.

- **Section 6 – Reinstatement of the Persuader Rule and Expanded Consultant Reporting**

H.R. 2474 also includes a reinstatement of the Obama era Department of Labor expanded reporting requirement rule for entities that provide assistance for employers and entities in union campaign situations. This rule was revoked by the present Administration on July 18, 2018. The Committee has not developed any record to support this proposed change in the law. Indeed, there are already in place substantial reporting requirements for employers and entities that provide financial assistance to employers in campaign situations. Finally, if the Committee is going to pursue this area, it should review the activities of worker centers, employee committees, and like organizations to determine whether they should also be required to report their activities to the United States Department of Labor on the same basis as traditional labor unions.

- **Section 5 – Removal of Secondary Boycott Restrictions on Unions**

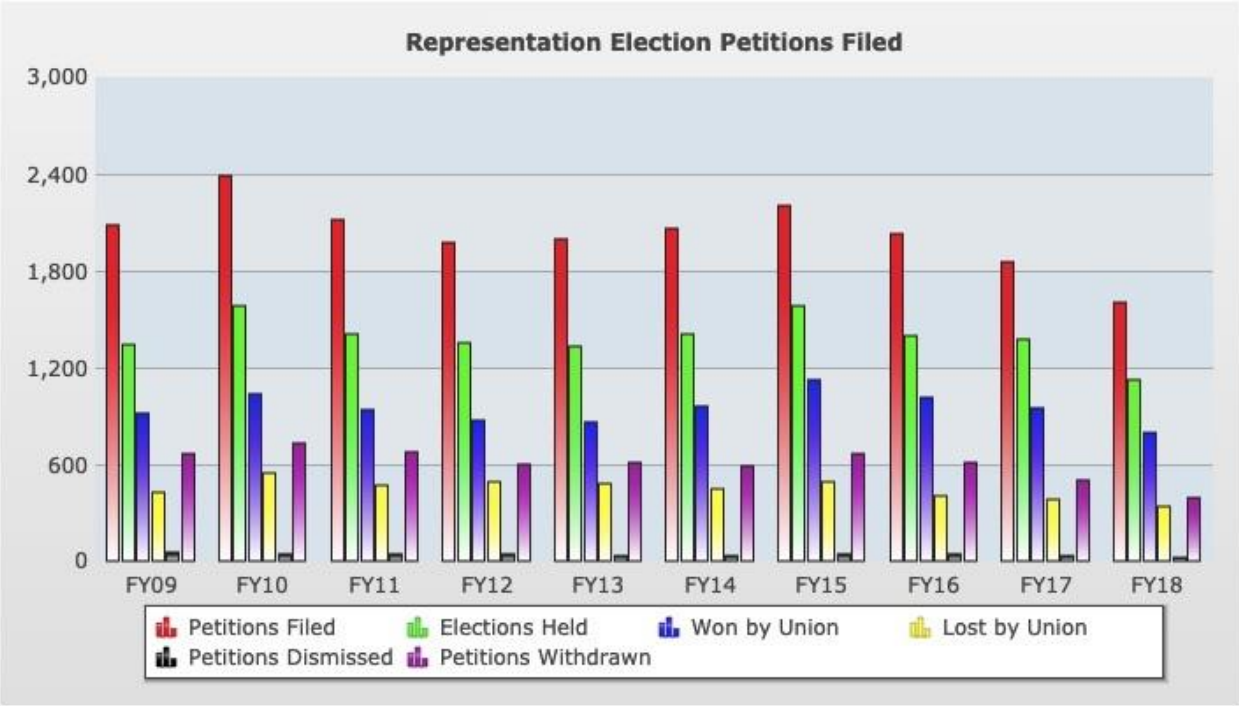
The PRO Act, in one of its most radical proposals, removes the ability of employers to obtain relief in court for illegal secondary boycott activities of unions. Secondary boycott protection for business entities, including in particular smaller entities that can be subject to boycott pressure and coercion, is often essential for their survival. Removal of such a deterrent from our nation's labor laws should not occur. Indeed, employers at present already face substantial obstacles in prohibiting illegal secondary activity.[18] The PRO Act takes absolutely the wrong approach in this area – restrictions against secondary boycott activities should be strengthened and neutral employers and employees should not be subject to such coercive activities. Indeed, the very survival of some business entities depends on the appropriate enforcement of laws in this area.

Conclusion

H.R. 2474 is a "wish list" serving only the interests of labor organizations that represent at most approximately 6% of the nation's private sector workforce. The argument that the lack of success of the union movement can be attributed to our nation's labor laws is not correct. Unions, to their detriment, have devoted increasingly smaller portions of their resources to union organizing, but yet are increasing the amount of resources devoted to political activity. Their apparent "gameplan" is to have Congress and federal regulatory agencies assist them in increasing union density in the country without regard to the impact on employees, consumers, and others. Our nation's labor laws are not broken, and Congress should not make radical changes as suggested in H.R. 2474. The numerous proposals in this legislation are not well thought out, are not supported by record evidence, and are unnecessarily biased against employers and employees. CDW, therefore, opposes the enactment the legislation.

[18] *See, e.g.*, *Wartman v. UFCW*, 871 F.3d 638 (4th Cir. 2017); *Int'l Union of Operating Engineers* et al., 2019 WL 3073999 (N.L.R.B. Div. of Judges) (Jul. 15, 2019); *Laborers' Int'l Union of North America* et al. 2015 WL 5000792 (N.L.R.B. Div. of Judges) (Aug. 21, 2015).

EXHIBIT 1[19]



	Petitions Filed	Elections Held	Won by Union	Lost by Union	Petitions Dismissed	Petitions Withdrawn
FY09	2082	1335	915	420	46	657
FY10	2380	1571	1036	535	37	725
FY11	2108	1398	935	463	43	667
FY12	1974	1348	868	480	38	597
FY13	1986	1330	852	478	27	607
FY14	2053	1407	952	440	24	586
FY15	2198	1574	1120	480	39	663
FY16	2029	1396	1014	401	38	610
FY17	1854	1366	940	375	29	493
FY18	1597	1120	790	330	17	386

[19] *Representation Petitions,* NLRB, https://www nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc.

From: Arent Fox LLP
To: Kaplan, Marvin E.
Subject: NLRB Announces Proposed Revisions to Representation Procedures
Date: Tuesday, August 20, 2019 1:50:19 PM

4 MIN READ / VIEW ONLINE

NLRB Announces Proposed Revisions to Representation Procedures

AUGUST 20, 2019 | ROBERT K. CARROL, RONNIE SHOU

The National Labor Relations Board recently issued a 113-page Notice of Proposed Rulemaking as the first of a planned series of revisions to its representation procedures under Section 9 of the National Labor Relations Act.

The three proposed amendments include: (1) replacing the current "blocking charge" policy with a "vote-and-impound" procedure; (2) modifying the immediate voluntary recognition bar and reinstating the *Dana* notice and open-period procedures; and (3) in the unique construction industry, requiring the showing of positive evidence of majority employee support, rather than mere contractual language, in order to transition an initial Section 8(f) bargaining relationship to a full Section 9(a) bargaining relationship.

Blocking Charges

Pursuant to Section 9 of the NLRA, if employees no longer wish to be represented by a union, either they, or the employer, can file an "RD (or RM) Petition" with the Board supported by at least 30% of the employees requesting the conduct of a decertification election to determine if the union has lost its majority status. However, under current Board policy, if an unfair labor practice charge (ULP) is filed during the pendency of a decertification petition, along with a blocking request, it may "block" the conduct of any election until it

is resolved, often resulting in lengthy delays, if not indefinite suspension, of the election process and concomitant impact on the employees' free choice of bargaining representative.

The NLRB's proposed new rule would replace the current "blocking charge" policy with a "vote-and-impound" procedure in which an election will be held regardless of whether a ULP charge has been filed. Under the new proposed rule, if the charge is not resolved before the election is scheduled, the election will be conducted, but the ballots cast in the elections will be impounded by the NLRB until the charge is resolved. In the Board's view, by avoiding unnecessary and potentially lengthy delay, this "vote-and-impound" process would preserve the employees' free choice while allowing the ULP charge to be processed appropriately. It is worth noting that this approach has been used successfully by the California Agricultural Labor Relations Board since 1975 in conducting elections in the highly – seasonal agricultural industry to preserve employee sentiment regarding union representation while assuring that any issues arising either before or after the election are properly resolved.

Voluntary Recognition Bar

Under current NLRA law, an employer may "voluntarily recognize" a union as the exclusive representative of the bargaining unit without conducting an NLRB secret-ballot election if the union presents the employer with an appropriate demonstration of majority support among the employees in the form of either union authorization cards or a signed petition. In 2007, the NLRB held in *Dana Corp*. that employees who become represented by a union pursuant to "voluntary recognition" have a period of 45 days after receiving notice of same within which they may reject that representation through a secret ballot election.

However, in 2011, in *Lamons Gasket Co.*, the Obama Board announced a voluntary recognition election bar, which expanded the 45-day period to a "reasonable period" of time (no less than six months, but not more than one year) before representation may be challenged in an election.

The NLRB's new proposed revision would reinstate the *Dana Corp*. rule, noting that "[t]his modification does not diminish the role that voluntary recognition plays in the creation of bargaining relationships, but ensures that employee free choice has not been impaired by a process that is less reliable than Board elections."

Collective Bargaining Relationships for Construction Industry Employers

The NLRA contains statutory provisions that are unique to the construction industry and the Board's third proposed amendment to its current representation procedures addresses one of those provisions. In particular, Section 8(f) of the NLRA permits construction industry employers and unions to sign "pre-hire agreements," which are collective bargaining agreements

signed without the union either being certified by an NLRB election or voluntarily recognized after demonstrating majority support even before any employees have been hired. “Pre-hire agreements” are enforceable for their particular term, but do not bar a representation election petition filed by either a rival union or disaffected employees. Also, upon termination of a “prehire agreement” under Section 8(f), the employer has no duty to bargain for a new agreement.

However, unlike Section 8(f), bargaining relationships arising under Section 9(a) of the NLRA require that the union be the chosen representative of a majority of the bargaining unit employees. Thus, if a Section 8(f) relationship is ultimately converted to one governed by Section 9(a), the union has the same rights and the employer has the same obligations as those extant in any non-construction industry collective bargaining relationship.

The Board’s third proposed amendment addresses the standard of proof for converting an initial Section 8(f) bargaining relationship into a full Section 9(a) bargaining relationship. In 2001, in *Staunton Fuel & Material*, the NLRB held that a construction industry union could prove Section 9(a) recognition by merely executing a collective bargaining agreement with the employer with language indicating that union requested and obtained recognition as a representative of the unit and, significantly, there was no requirement that the union provide positive evidence of majority support among employees beyond the language in the contract. However, the Board’s new proposed amendment would require the union to provide extrinsic “clear evidence” that shows that its recognition by the employees “was based on a contemporaneous showing of majority employee support,” and was not simply the mere choice of either the union or the employer to convert the Section 8(f) relationship into one arising under Section 9(a) of the NLRA.

What’s Next?

The NLRB’s proposed changes to its representation procedures, published on August 12th in the *Federal Register*, are subject to a public comment period of 60 days and, of course, interested parties should not assume that any of the changes proposed will automatically be adopted by the Board. Additionally, whether or not these proposed changes are ultimately adopted, they demonstrate the Trump-appointed Board’s interest in allowing employees to have a meaningful opportunity to choose whether or not they want union representation, or its continuation, by providing a means by which employees may exercise their free choice of bargaining representatives without unnecessary legal restrictions.

Smart In Your World

Arent Fox’s Labor & Employment group will continue to monitor developments in this area. If you have any questions, please contact Robert K. Carrol, Ronnie Shou, or

the Arent Fox professional who usually handles your matters.

Contacts

Robert K. Carrol
Partner, SF

Ronnie Shou
Attorney, SF



Smart In Your World

arentfox.com

Arent Fox LLP
1717 K Street, NW
Washington, DC 20006
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From: (b) (6)
To: Kaplan, Marvin E.
Subject: Call Availability - CUE
Date: Friday, September 27, 2019 10:19:48 AM
Attachments: NLRB UPDATE[1].docx

Good Morning,

(b) (6) would like to have a call in the next 2 weeks to discuss the CUE Conference and the attached outline to be used as a handout. Please let me know what availability you have, if any, and I will send out a calendar invite.

Thanks so much,

(b) (6)
(b) (6) (b) (6) King
Office: (b) (6)
Fax: (614) 423-2991

MEMORANDUM September 18, 2019

TO:

FROM: [redacted]
HR Policy Association

RE: NLRB UPDATE

NLRB activity, through both adjudication and rulemaking, has picked up considerably over the last few months. Outlined below is an update of significant Board decisions and rulemaking initiatives during this time period.

BOARD DECISIONS

- *The Boeing Company*, 368 NRLB No. 67 (Sept. 9, 2019) – **Bargaining Units**
  - The Board applied and clarified the traditional community-of-interest standard for determining bargaining units, ruling that a petitioned-for-unit at Boeing's South Carolina plant that was limited to only two job classifications within a production line was not an appropriate unit.

- *Velox Express, Inc.* – 368 NLRB No. 61 (Aug. 29, 2019) – **Misclassification**
  - The Board held that employers do not violate the National Labor Relations Act ("NLRA" and "Act") solely by misclassifying employees as independent contractors. While this decision generated significant media attention due to the emerging gig economy context, it is important to note that this decision merely reaffirmed long standing precedent that misclassification **alone** does not constitute an unfair labor practice. Employers, however, who intentionally misclassify employees, however, to avoid coverage of the NLRA will, in all likelihood, be found to have violated the Act, and may also have problems under other labor statutes such as the Fair Labor Standards Act for failing to pay overtime at the proper rate.

- *M.V. Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019) – **Employer Unilateral Changes to Contract**
  - The Board adopted the "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the NLRA. The Board abandoned its existing "clear and unmistakable waiver" standard, under which virtually any employer's unilateral change violates the NLRA unless a contractual provision unequivocally and specifically referred to the type of employer action at issue. Under the new "contract coverage"

standard, the Board will examine the plain language of the CBA to determine whether the change made by the employer was within the or scope of contractual language granting the employer the right to act unilaterally. This decision is especially important for employers that may need to make modifications in their benefit plans during the term of a collective bargaining agreement.

- *UPMC*, 368 NLRB No. 2 (Jun. 14, 2019) & *Kroger LP*, 368 NLRB No. 64 (Sept. 6, 2019) – **Access to Employer Private Property**
    - In a pair of cases, the Board significantly restricted union access to private employer property, supplying employers with powerful tools to combat prohibited solicitation and related activities on their premises. For example, under a 37-year-old precedent, employers were required to allow nonemployee union reps access to public areas of their property, such as dining areas or cafeterias, for solicitation and distribution purposes.
        - In *UPMC*, the Board held that employers **do not** have to allow nonemployees access to such areas for such purposes, provided they enforce their no solicitation/no distribution policies in a consistent and nondiscriminatory manner.
        - In *Kroger*, the Board held that an employer could lawfully eject nonemployee union reps soliciting petition signatures from a shared shopping center parking area.
        - *UPMC* and *Kroger* - This pair of cases represents a significant expansion in employer rights to eject nonemployee union personnel from their private property. These holdings create a new Board standard in which an employer can bar non-employees from their property so long as the employer policy is nondiscriminatory for activities that "*are similar in nature*." Thus, an employer could bar nonemployees from their property if they are engaging in picketing or boycotts, even if the same policy allowed for charitable groups to solicit, since the two activities are not similar in nature.

- *Cordua Restaurants, Inc.*, 368 NLRB No. 43 (Aug. 14, 2019) – **Arbitration Agreements**
    - This was the first Board decision to address the mandatory arbitration agreements since the Supreme Court's 2018 ruling in *Epic Systems v. Lewis*, which held that class and collective action waivers in mandatory arbitration agreements do not violate the NRLA. In *Cordua*, the Board held that:
        - Employers are not prohibited under the National Labor Relations Act (NLRA) from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.
        - Employers, however, are not prohibited under the NLRA from promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act or state wage-and-hour laws.

        - Employers are prohibited from taking adverse action against employees for engaging in concerted activity by filing a class or collective action, consistent with the Board's long-standing precedent.

- *Wendy's Restaurant*, 368 NLRB No. 72 (Sept. 11, 2019) – **Arbitration Agreements**
    - In a supplemental decision, the Board held that the arbitration agreements a Wendy's franchisee makes employees sign are valid because the agreements have a "savings clause" notifying workers that the agreements do not prevent them from filing a complaint or charge with an administrative agency such as the NLRB. The decision provides clarity for employers on how to properly draft arbitration agreements so as to make clear that despite mandatory arbitration, employees still have recourse through administrative agencies such as the NLRB.

- *General Motors LLC*, 368 NLRB No. 68 (Sept. 5, 2019) – **Offensive Language in the Workplace**
    - In this ongoing case, the Board recently invited briefs on whether the Board should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature in the workplace. The current standard as applied has resulted in multiple decisions in which extreme language was held to be protected by Section 7 of the NLRA. While this case is months away from being resolved, it is notable that the Board is considering loosening employee speech protections and allowing employers to have more latitude in ensuring decorum in the workplace. The ultimate holding in this case may also better align requirements of Title VII and the NLRA in situations where racially offensive language is used in the workplace and in strike situations.

DIVISION OF ADVICE

- The Board's Division of Advice recently released three guidance memos – related to cases in 2013, 2015, and 2018 – concerning social media policy, arbitration, and financial information disclosure during collective bargaining.
    - The first memo concluded that a rehab center and nursing home's social media policy for its employees was illegal, because it blocked workers from posting any information or rumors about the employer that were either false or inaccurate, which could chill employees' willingness to freely discuss concerns about their terms and conditions of employment.
    - The second memo concluded that a car dealership illegally tried to limit workers' ability to collectively pursue claims in arbitration that they weren't properly paid overtime.
    - The third memo concluded that an NBC affiliate illegally refused to provide its union with financial information about the company during collective bargaining talks.

RULEMAKING

A. **NPRMs**

- Union Election Procedures (Aug. 12, 2019)
    - The Board published a Notice of Proposed Rulemaking on August 12, 2019, proposing three amendments to its current election rules and regulations in the interest of expanded employee free choice.
        - **Blocking Charge Policy**: elections would no longer be blocked by pending unfair labor practice charges, but ballots would be impounded until charges are resolved. The current blocking charge procedure has often resulted in decertification petitions being blocked from an election for a substantial period of time.
        - **Voluntary Recognition Bar**: for voluntary recognition under Section 9(a) to bar a subsequent representation election – and for a post-recognition CBA to have contract-bar effect – unit employees must receive notice that voluntary recognition has been granted and a 45-day period must be provided to employees to permit them to file an election petition to challenge the voluntary recognition.
        - **Section 9(a) Recognition in the Construction Industry**: in the construction industry, proof of a Section 9(a) relationship will require positive evidence of majority employee support and cannot be based on contract language alone.
- Joint Employer (Sept. 13, 2018; commenting period closed Feb. 11, 2019)
    - The Board published a Notice of Proposed Rulemaking regarding the standard for determining joint employer status. The public comment period closed in February 2019. The proposed rule requires that before an entity can be found to be a joint employer under the NLRA, evidence must establish that such entity had actual, direct and immediate control over the essential terms and conditions of employment of the employees in question. A final rule on this controversial topic will likely arrive before the end of the year.

B. **On the Rulemaking Agenda** (May 22, 2019)

- Representation Case Procedures
    - The Board, in its rulemaking agenda published in May, indicated that it would make substantial changes to the union-friendly election rules promulgated by the Obama-era Board in 2014. The 2014 changes assist unions in their organizing campaigns by establishing an accelerated time period for an election after a petition has been filed, and by requiring voter eligibility issues to be resolved.

- Access to Employer's Private Property
    - The Board's published rulemaking agenda also indicated an intent to initiate rulemaking regarding the standards for access to an employer's private

property. A proposed rule would likely mirror the recent Board decisions in *UPMC* and *Kroger* and significantly limit nonemployee access to employer private property. The Board may also seek to clarify the rights of off-duty employees to come onto their employer's property, and when such access can be denied or restricted.

- Students as Employees
    - Per the Board's published rulemaking agenda, the NLRB will also consider rulemaking regarding the standard for determining whether students who perform services at private colleges or universities in connection with their studies are "employees" under the NLRA.

From: (b) (6)
To: Kaplan, Marvin E.
Subject: Outline for CUE Conference
Date: Tuesday, October 1, 2019 9:48:42 AM
Attachments: NLRB UPDATE - FINAL.docx

Good Morning,

Attached is the outline for the CUE Conference.

Thanks,

(b) (6)
(b) (6) (b) (6)
Office: (b) (6)
Fax: (614) 423-2991

MEMORANDUM September 18, 2019

TO:

FROM: (b) (6)
Senior Labor and Employment Counsel
HR Policy Association

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        - Employers are not prohibited under the National Labor Relations Act (NLRA) from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.
        - Employers, however, are not prohibited under the NLRA from promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act or state wage-and-hour laws.

        - Employers are prohibited from taking adverse action against employees for engaging in concerted activity by filing a class or collective action, consistent with the Board's long-standing precedent.

- *Wendy's Restaurant*, 368 NLRB No. 72 (Sept. 11, 2019) – **Arbitration Agreements**
    - In a supplemental decision, the Board held that the arbitration agreements a Wendy's franchisee makes employees sign are valid because the agreements have a "savings clause" notifying workers that the agreements do not prevent them from filing a complaint or charge with an administrative agency such as the NLRB. The decision provides clarity for employers on how to properly draft arbitration agreements so as to make clear that despite mandatory arbitration, employees still have recourse through administrative agencies such as the NLRB.

- *General Motors LLC*, 368 NLRB No. 68 (Sept. 5, 2019) – **Offensive Language in the Workplace**
    - In this ongoing case, the Board recently invited briefs on whether the Board should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature in the workplace. The current standard as applied has resulted in multiple decisions in which extreme language was held to be protected by Section 7 of the NLRA. While this case is months away from being resolved, it is notable that the Board is considering loosening employee speech protections and allowing employers to have more latitude in ensuring decorum in the workplace. The ultimate holding in this case may also better align requirements of Title VII and the NLRA in situations where racially offensive language is used in the workplace and in strike situations.

DIVISION OF ADVICE

- The Board's Division of Advice recently released three guidance memos – related to cases in 2013, 2015, and 2018 – concerning social media policy, arbitration, and financial information disclosure during collective bargaining.
    - The first memo concluded that a rehab center and nursing home's social media policy for its employees was illegal, because it blocked workers from posting any information or rumors about the employer that were either false or inaccurate, which could chill employees' willingness to freely discuss concerns about their terms and conditions of employment.
    - The second memo concluded that a car dealership illegally tried to limit workers' ability to collectively pursue claims in arbitration that they weren't properly paid overtime.
    - The third memo concluded that an NBC affiliate illegally refused to provide its union with financial information about the company during collective bargaining talks.

RULEMAKING

A. **NPRMs**

- Union Election Procedures (Aug. 12, 2019)
    - The Board published a Notice of Proposed Rulemaking on August 12, 2019, proposing three amendments to its current election rules and regulations in the interest of expanded employee free choice.
        - **Blocking Charge Policy**: elections would no longer be blocked by pending unfair labor practice charges, but ballots would be impounded until charges are resolved. The current blocking charge procedure has often resulted in decertification petitions being blocked from an election for a substantial period of time.
        - **Voluntary Recognition Bar**: for voluntary recognition under Section 9(a) to bar a subsequent representation election – and for a post-recognition CBA to have contract-bar effect – unit employees must receive notice that voluntary recognition has been granted and a 45-day period must be provided to employees to permit them to file an election petition to challenge the voluntary recognition.
        - **Section 9(a) Recognition in the Construction Industry**: in the construction industry, proof of a Section 9(a) relationship will require positive evidence of majority employee support and cannot be based on contract language alone.
- Joint Employer (Sept. 13, 2018; commenting period closed Feb. 11, 2019)
    - The Board published a Notice of Proposed Rulemaking regarding the standard for determining joint employer status. The public comment period closed in February 2019. The proposed rule requires that before an entity can be found to be a joint employer under the NLRA, evidence must establish that such entity had actual, direct and immediate control over the essential terms and conditions of employment of the employees in question. A final rule on this controversial topic will likely arrive before the end of the year.

B. **On the Rulemaking Agenda** (May 22, 2019)

- Representation Case Procedures
    - The Board, in its rulemaking agenda published in May, indicated that it would make substantial changes to the union-friendly election rules promulgated by the Obama-era Board in 2014. The 2014 changes assist unions in their organizing campaigns by establishing an accelerated time period for an election after a petition has been filed, and by requiring voter eligibility issues to be resolved.

- Access to Employer's Private Property
    - The Board's published rulemaking agenda also indicated an intent to initiate rulemaking regarding the standards for access to an employer's private

property. A proposed rule would likely mirror the recent Board decisions in *UPMC* and *Kroger* and significantly limit nonemployee access to employer private property. The Board may also seek to clarify the rights of off-duty employees to come onto their employer's property, and when such access can be denied or restricted.

- Students as Employees
    - Per the Board's published rulemaking agenda, the NLRB will also consider rulemaking regarding the standard for determining whether students who perform services at private colleges or universities in connection with their studies are "employees" under the NLRA.